87-1157

No. .....

In The

Supreme Court of the United States

October Term, 1987

THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and TONY VASKA,

Petitioners,

vs.

THE ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., THE ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC., FRANK L. DUNKLE, Director, United States Fish and Wildlife Service, and DONALD COLLINSWORTH, Commissioner of the Alaska Department of Fish and Game,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Subsequent to 1925, did the Alaska Game Act, Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211), and regulations adopted pursuant to that Act, govern the taking of migratory waterfowl in Alaska?

II. If the answer to question no. I, is yes, did the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (reprinted at 48 U.S.C. prec. § 21), repeal the Alaska Game Act insofar as the latter Act, and regulations adopted pursuant to that Act, govern the taking of migratory waterfowl in Alaska?

III. Did the court of appeals have jurisdiction to determine whether § 3(h)(2) of the Fish and Wildlife Improvement Act, 16 U.S.C. § 712(1) (1978), delegates the Secretary of the Interior authority to adopt regulations authorizing the indigenous inhabitants of Alaska to take migratory waterfowl during seasons of the year, i.e., spring and summer, during which migratory bird treaties with Canada and Mexico prohibit the taking of migratory waterfowl?

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Petitioners Alaska Federation of Natives, et al., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 829 F.2d 933, and is reprinted in the appendix (App.) at App. 1.

The memorandum decision of the United States District Court for the District of Alaska (von der Heydt, J.) is not reported. The decision is reprinted at App. 33.

JURISDICTION

Respondents Alaska Fish and Wildlife Federation and Outdoor Council, Inc. and Alaska Fish and Wildlife Conservation Fund, Inc. (collectively Outdoor Council) filed an action in the United States District Court for the District of Alaska against the state and federal respondents. The petitioners intervened, and, invoking federal jurisdiction under 28 U.S.C. § 1331, filed a cross-claim seeking declaratory relief against the federal respondent. On January 24, 1986, the district court entered a final judgment, granted the petitioners' request for declaratory relief and dismissed the Outdoor Council complaint.

On October 9, 1987, the Court of Appeals for the Ninth Circuit reversed, dismissed the cross-claim and remanded the case to the district court to adjudicate the merits of the Outdoor Council claims. No petition for rehearing was sought.

The jurisdiction of this Court to review the opinion of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Alaska Game Act, Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211) (pertinent text set forth at App. 66).

Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703-711) (pertinent text set forth at App. 69).

Fish and Wildlife Improvement Act, § 3(h)(2), 16 U.S.C. § 712(1) (1978). (pertinent text set forth at App. 71).

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STATEMENT OF THE CASE

This case presents questions of first impression regarding the intent of Congress embodied in statutes governing the taking of ducks, geese and other migratory waterfowl in Alaska.

Alaska is unique in that it is the only one of the 50 states in which such a significant number of residents, most of whom are Indians, Eskimos and Aleuts (Alaska Natives), depend upon the harvest of fish, game, waterfowl and plants for their sustenance. As the House Committee on Interior and Insular Affairs noted as recently as 1978: "There are more than 200 rural communities throughout Alaska. In many, fresh meat, fish and produce are unavailable except through the subsistence harvest." House Report No. 1045, Part I, 95th Cong., 2d Sess. 182 (1978) [hereinafter House Report].

In recognition of this special circumstance, Congress has consistently taken care to ensure that conservation legislation affecting Alaska does not disrupt traditional Native subsistence hunting and fishing activities. *See* Walrus Act, Pub. L. No. 77-219, 55 Stat. 632 (1941) (Native subsistence hunting exempted from prohibition on

taking walrus); Marine Mammal Protection Act, § 101 (b), 16 U.S.C. § 1371(b) (1972) (Native subsistence hunting exempted from moratorium on taking marine mammals); Endangered Species Act, § 10(e)(1), 16 U.S.C. § 1539(e)(1) (1973) (Native subsistence hunting exempted from restrictions on taking endangered and threatened species); Alaska National Interest Lands Conservation Act, §§ 801-816, 16 U.S.C. §§ 3111-3126 (1980) (title establishing a priority for subsistence hunting and fishing on public lands in Alaska). *See also* House Conference Report No. 746, 92d Cong., 1st Sess. 37 (1971) ("The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives.").

Of all Alaska Natives, none are more dependent upon subsistence hunting and fishing than the Yup'ik Eskimo people who live in villages on the Yukon-Kuskokwim River delta, a vast, fan-shaped expanse of low tundra which stretches some 250 miles from Norton Sound immediately north of the mouth of the Yukon River to the Kilbuck Mountains south of Kuskokwim Bay. The delta is an internationally significant summer nesting ground for migratory waterfowl, including four species of arctic nesting geese (cackling Canada, white-fronted and emperor geese and black brant) which are important subsistence resources. As the district court found below: "The species traditionally have been hunted by Natives during the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet." App. 34.

Unfortunately for Alaska Natives, although migratory waterfowl are only present in Alaska during spring and summer, for reasons unrelated to the Native subsistence harvest, by the turn of the century spring and summer hunting had become the subject of considerable controversy in the lower 48 states where sport and market hunters, particularly on Chesapeake Bay and in the midwestern states, had shot some migratory waterfowl populations to the brink of extinction. Although conservationists opposed spring and summer hunting, in 1900 hunting was considered an activity within the exclusive regulatory purview of the states, and conservationists had little influence in most state legislatures. But the federal government governed Alaska and conservationists had considerably more influence in Congress. As a result, the first Alaska Game Act enacted in 1902 prohibited the taking of migratory waterfowl between December 15th and September 1st. However, in doing so, Congress was careful to exempt Alaska Natives hunting for food from compliance with the closed season. Pub. L. No. 57-147, 32 Stat. 327 (1902). An arrangement Congress continued when it reenacted the Alaska Game Act in 1908. Pub. L. No. 60-111, 35 Stat. 102 (1908).

In 1913 Congress preempted state jurisdiction and authorized the Department of Agriculture to prepare, and the President to adopt, regulations governing the taking of migratory waterfowl throughout the United States. Pub. L. No. 62-430, 37 Stat. 828, 847 (1913). Regulations implementing the 1913 Act prohibited the taking of migratory waterfowl during spring and summer. 38 Stat. 1960 (1913). Significantly, the regulations did not apply to

Alaska where the 1908 Alaska Game Act already prohibited spring and summer hunting.

The constitutionality of the 1913 Act was immediately challenged. *See United States v. Shauver*, 214 F. 154 (D. Arkansas 1914), *appeal dismissed*, 248 U.S. 594 (1919); *United States v. McCullagh*, 221 F. 288 (D. Kansas 1915). To bolster the constitutionality of the Act before the litigation reached this Court, the Department of Agriculture urged the Department of State to negotiate a migratory bird treaty with Canada. The Department of State negotiated a treaty whose text is near identical to the text of the regulations implementing the 1913 Act, including the regulations prohibiting spring and summer hunting. The treaty was ratified in 1916. Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628.

The treaty is not self-executing. As a result, in 1918 Congress enacted the Migratory Bird Treaty Act (MBTA) which authorized the Secretary of Agriculture (Secretary)[1] to adopt regulations governing the taking of migratory waterfowl and required the regulations to be consistent with the provisions of the treaty. Pub. L. No. 65-186, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703-

[1]The Bureau of Biological Survey was the agency within the Department of Agriculture responsible for implementing both the MBTA and the Alaska Game Act. In 1939 the Bureau moved to the Department of the Interior. Reorg. Plan No. II, § 4 (f), 4 Fed. Reg. 2731, 53 Stat. 1433 (1939). Consequently, all references to "Secretary" in the instant petition which refer to events subsequent to July 1, 1939, refer to the Secretary of the Interior, rather than the Secretary of Agriculture.

711). The constitutionality of the MBTA was upheld in *Missouri v. Holland,* 252 U.S. 416 (1920).

Although the Canadian treaty exempts Alaska Natives from compliance with closed seasons on the taking of sea birds, unlike the 1902 and 1908 Alaska Game Acts, the treaty does not exempt Natives from compliance with closed seasons on the taking of migratory waterfowl. As a result, the district court concluded that "Congress intended the MBTA [rather than the 1908 Alaska Game Act] to apply to subsistence hunting [of migratory waterfowl] in Alaska." App. 38.

However, in 1925 Congress enacted a new Alaska Game Act. Pub. L. No. 68-320, 43 Stat. 739 (1925) (reprinted as amended at 48 U.S.C.A. §§ 192-211). Section 8 of the Act, 48 U.S.C.A. § 195, prohibited the taking of game, fur-bearing animals and wild birds "unless and except as permitted by this Act or by regulations made pursuant to this Act." Section 2, 48 U.S.C.A. § 206, defined "take" to include the taking or killing of "game birds," and defined "game birds" to include "migratory waterfowl, commonly known as ducks, geese, brant, and swans." Section 10, 48 U.S.C.A. § 198, authorized the Secretary to adopt regulations governing the taking of game birds in Alaska, but prohibited the Secretary from adopting regulations that "contravene any of the provisions of the migratory bird treaty Act and regulations." Lastly, and most importantly, § 10 exempted Indians and Eskimos from compliance with regulations establishing closed seasons, including regulations establishing closed seasons for the taking of game

birds, in situations in which they were "in absolute need of food" and did not have other food available.[2]

The court of appeals determined that the regulations the Secretary adopted in 1925 to implement the Alaska Game Act are ambiguous as to whether the Department of Agriculture believed Congress intended the Alaska Game Act or the MBTA to govern the Secretary's authority to adopt regulations authorizing the taking of migratory waterfowl in Alaska. App. 27. However, in 1944 the Secretary adopted a regulation which, by administrative fiat, wrote "game birds" out of the Act. 50 C.F.R. § 91.3 (1944), *printed at* 9 Fed. Reg. 5270-5271 (1944). *See* App. 48-49.

Despite the regulation, between 1918 and 1960 there is no record of any Alaska Native having been cited for taking migratory waterfowl for food during closed seasons established by regulations adopted pursuant to either the Alaska Game Act or the MBTA. Indeed, a 1969 report on Native subsistence migratory waterfowl hunting which the United States Fish and Wildlife Service (FWS) commissioned and which the federal respondent submitted to the district court as his own exhibit concludes that between 1925 and Alaska statehood in 1959 FWS assumed that § 10

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[2]In 1940 the "in absolute need of food" standard was amended to allow Natives to hunt during closed seasons when they or their families are in need of food "and other sufficient food is not available." Pub. L. No. 76-836, 54 Stat. 1103 (1940). The committee report explaining the change indicates that Congress intended the 1940 amendment to expand the emergency take provision in the 1925 Act into a broad Native subsistence hunting exemption similar to the Native subsistence hunting exemption in the Marine Mammal Protection Act. *See* House Rept. No. 2746, 76th Cong., 3d Sess. (1940).

of the Alaska Game Act exempted Native subsistence hunters from compliance with regulations establishing closed seasons. The author of the report, Albert Day, joined FWS's predecessor agency, the Bureau of Biological Survey, in 1918, and from 1946 to 1953 served as the Director of FWS when it was known as the Bureau of Sport Fisheries and Wildlife. After reviewing internal memoranda, and based upon 51 years of experience with the agency that implemented both the MBTA and the Alaska Game Act, former director Day concluded that:

> To now assume—45 years later—that the Eskimo, Indian, traveler exemption [in the Alaska Game Act] was capricious, would beg the evidence of history. Rather, it must be assumed that these implementing regulations were adopted with full approval of the legal and legislative authorities of the day as consistent with the Migratory Bird Treaty Act. The administration of the Alaska Game Law proceeded without conflict with the Natives of Alaska until the Statehood Act of 1958 repealed that Act and the regulations thereunder. There is no record of anyone ever challenging the Alaska Game Law on this point.

Federal Defendant's Ex. A at 93.

In 1959 Alaska was admitted to the federal union as the 49th state. Proclamation No. 3269, 24 Fed. Reg. 81 (1959). However, Congress did not transfer the new state authority to regulate the taking of fish and game within its borders until 1960. Alaska Statehood Act, §6(e), Pub. L. No. 85-508, 72 Stat. 339 (1958) (reprinted at 48 U.S.C. prec. § 21); Exec. Order No. 10,857, 25 Fed. Reg. 33 (1960). Significantly, when regulatory authority was transferred,

the federal government retained authority to regulate the taking of migratory waterfowl. *See* Senate Rept. No. 1929, 81st Cong., 2d Sess. 14 (1950). *See also* App. 51-52. Nevertheless, that spring FWS enforcement officers began arresting Native hunters for taking migratory waterfowl during spring and summer seasons closed by regulations adopted pursuant to the MBTA.

In May 1961 the new enforcement policy became a national issue when an Inupiat Eskimo was arrested near Point Barrow for hunting ducks during the closed season and the next day 100 Inupiats, each in the possession of an eider duck, demanded to be arrested. When the Alaska congressional delegation protested the new policy, Assistant Secretary of the Interior Frank Briggs responded that "treaty provisions give the Department no recourse but to carry out a progressive program of enforcement." *See generally* 107 Cong. Rec. 18,416-25 (1961).

For the next 11 years Native subsistence hunters were sporadically arrested for hunting migratory waterfowl during spring and summer seasons closed by regulations adopted pursuant to the MBTA. A generation of hunters grew to manhood believing that for reasons they did not understand Congress had criminalized an important Native subsistence activity, and a generation of congressmen and FWS employees completed their tenure of public service believing the same, i.e., that no matter how unfair, Congress intended Native subsistence hunting to be subject to regulations adopted pursuant to the MBTA, and the MBTA prohibited the Secretary from adopting regulations establishing spring and summer seasons for Native subsistence hunting since the migratory bird treaties to which

the United States was party[3] prohibited hunting during the spring and summer.

To remedy the problem, the Department of State negotiated a migratory bird treaty with Japan which was ratified in 1972. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990. Article III, ¶ 1(e) of the treaty exempts Indians and Eskimos who take migratory waterfowl for food or clothing from compliance with regulations establishing closed seasons. In 1976 the Department of State negotiated, and in 1978 the Senate ratified, a migratory bird treaty with the Soviet Union which authorizes the United States to allow the "indigenous inhabitants of the State of Alaska" to take migratory waterfowl for nutritional and other essential needs during any season of the year. Convention Concerning the Conservation of Migratory Birds and Their Environment, November 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073. The same year Congress added an amendment to the Fish and Wildlife Improvement Act which, "in accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics," delegates the Secretary au-

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[3]In 1936 the United States entered into a migratory bird treaty with Mexico. Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912. Like the Canadian treaty, the Mexican treaty is not self-executing. Rather, pursuant to Article II of the treaty, the United States government agreed to establish laws and regulations establishing a closed season on the taking of ducks between March 10 and September 1. The treaty makes no mention of Native subsistence hunting.

thority to adopt regulations authorizing such takings. Fish and Wildlife Improvement Act, § 3(h)(2), 16 U.S.C. § 712(1) (1978).

However, subsequent to the enactment of §3(h)(2), FWS announced that, as it interpreted the intent of Congress embodied in the statute, the Secretary was prohibited from adopting regulations pursuant to this new authority until the Canadian and Mexican treaties are amended to authorize subsistence hunting during the spring and summer. An amendment to the Canadian treaty was negotiated in 1979 and sent to the Senate for ratification late in 1980. Protocol Amending the 1916 Convention with Canada for the Protection of Migratory Birds, January 30, 1979, Senate Doc. Executive W, 96th Cong., 2d Sess. (1980). However, immediately upon assuming office in 1981, Secretary James Watt requested the Committee on Foreign Relations to delay action on the amendment to enable the Department of the Interior to review objections raised by several sportsmen's organizations. Intervenors' Ex. B. The request was granted, and seven years later the Department is still reviewing the matter.

In the meantime, in 1983 FWS acquired data which indicated that three species of geese that nest on the Yukon-Kuskokwim River delta (cackling Canada and white-fronted geese and black brant) were exhibiting a statistical population decline. After reviewing the evidence, the district court found that loss of habitat in the lower 48 states, predation by foxes and other predators and sport and Native subsistence hunting had contributed to the decline. App. 34. Of the list, hunting is the only variable that lends itself to quick governmental intervention.

However, FWS (having decided in 1944 not to regulate Native subsistence hunting pursuant to the Alaska Game Act, and having decided in 1978 that Native subsistence hunting could not be regulated pursuant to § 3(h)(2) of the Fish and Wildlife Improvement Act until the Senate ratifies treaty amendments such as the amendment Secretary Watt requested not be ratified) found itself without the regulatory tools needed to discharge its statutory responsibilities.

As a result, FWS asked the Yup'ik Eskimo people of the Yukon-Kuskokwim River delta to voluntarily limit their subsistence harvest of the three species. After an historic series of negotiations, in January 1984 petitioner Association of Village Council Presidents (AVCP), FWS, and the Alaska and California Departments of Fish and Game developed the Hooper Bay Agreement.[4] The National Audubon Society also supported the Agreement.

Pursuant to the Hooper Bay Agreement, FWS and the California Department of Fish and Game agreed to adopt regulations reducing sport hunting and to acquire new winter habitat. Petitioner AVCP agreed to request the Eskimo residents of the Yukon-Kuskokwim River delta not to gather eggs, not to hunt cackling Canada geese at any time, and not to hunt white-fronted geese and black

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[4]In 1985 AVCP, FWS and the Alaska and California Departments of Fish and Game negotiated a new agreement called the Yukon-Kuskokwim Delta Goose Management Plan (YDGMP). Similar in content to the Hooper Bay Agreement, the YDGMP added emperor geese to the list of migratory waterfowl populations subject to the agreement. Since 1985, the YDGMP has been renewed annually.

brant while the birds were nesting, molting or rearing their young.

Shortly thereafter, respondent Outdoor Council filed a complaint in the district court against the state and federal respondents which alleged *inter alia* that the Hooper Bay Agreement authorized Native hunters to take migratory waterfowl in violation of regulations establishing closed seasons adopted pursuant to the MBTA. The Outdoor Council also requested a preliminary injunction ordering FWS to enforce MBTA regulations against Native hunters. The petitioners intervened and the district court denied the motion. In doing so, the court held that "There is a public interest in both protecting the subsistence lifestyle of the Natives and protecting the populations of the bird species," and that "The Hooper Bay Agreement represents the first comprehensive effort to stop the decline of the species." App. 63.

The petitioners then filed a cross-claim against the federal respondent. The cross-claim alleged that Congress intended the Secretary to regulate the taking of migratory waterfowl in Alaska through regulations adopted pursuant to the Alaska Game Act, rather than the MBTA, and that the Alaska Game Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons. The cross-claim further alleged that the Alaska Statehood Act did not repeal the provisions of the Alaska Game Act relating to the taking of migratory waterfowl. Lastly, the cross-claim alleged that the Secretary's conclusion that § 3(h)(2) of the Fish and Wildlife Improvement Act prohibits the adoption of regulations authorizing indigenous inhabitants of the State of Alaska

to take migratory waterfowl until amendments to the Canadian and Mexican treaties are ratified was error.

The parties filed cross-motions for summary judgment. On January 24, 1986, the district court issued a memorandum decision and a final judgment denying the respondents' motions, granting the petitioners' motion in part and dismissing the Outdoor Council claims. The district court held that the Alaska Game Act, rather than the MBTA, controls the adoption of regulations governing the taking of migratory waterfowl in Alaska, and that the Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons. The court further held that the Alaska Statehood Act did not repeal the Alaska Game Act insofar as the latter Act governs the taking of migratory waterfowl. Lastly, the court refused to decide whether the Secretary presently has authority to adopt regulations pursuant to § 3(h)(2) of the Fish and Wildlife Improvement Act. App. 33-60.

On an appeal filed by respondent Outdoor Council,[5] the court of appeals reversed. The court held that the MBTA, rather than the Alaska Game Act, controls the adoption of regulations governing the taking of migratory waterfowl in Alaska, and that, unlike the Alaska Game Act, the MBTA does not exempt Native subsistence hunters from compliance with regulations establishing closed seasons. The court further held that, assuming *arguendo* it was controlling, the Alaska Game Act has been repealed by the Alaska Statehood Act. Lastly, the court

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[5]The state and federal respondents did not appeal the district court decision.

held that § 3(h)(2) of the Fish and Wildlife Improvement Act prohibits the Secretary from adopting regulations authorizing the taking of migratory waterfowl during the spring and summer until amendments to the Canadian and Mexican treaties are ratified. App. 1-32.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The intent of Congress embodied in the MBTA, the Alaska Game Act and the Alaska Statehood Act is a question of first impression and considerable public importance.

In 1980 Congress designated the Yukon-Kuskokwim River delta as the Yukon Delta National Wildlife Refuge. Alaska National Interest Lands Conservation Act (ANILCA), § 303(7), Pub. L. No. 96-487, 94 Stat. 2371 (1980). It did ~~so primarily~~ because of the delta's value as summer nesting habitat. According to the House Committee on Interior and Insular Affairs: "Over 50,000 swans, 700,000 geese and 2,300,000 ducks depart the Yukon Delta area each fall—figures which are significant internationally, as these birds migrate to all of North America and to other regions bordering the Pacific Ocean." House Report at 119.

Because of their concern for the protection of migratory waterfowl and wildlife populations upon which

their way of life depends, the Yup'ik Eskimo residents of the 34 villages within its boundaries strongly supported the establishment of the refuge. *Id.* ("The fish and wildlife resources of this wildlife range are essential to the traditional lifestyles of the area's 11,000 Native residents. Native support for the area has been resounding. . . ."). In recognition of the importance of Native subsistence hunting and fishing, Congress designated "the opportunity for continued subsistence uses by local residents" as a purpose of the Yukon Delta National Wildlife Refuge. ANILCA, § 303(7)(B)(iii).

But the Native subsistence migratory waterfowl harvest is not unique to the Yukon-Kuskokwim River delta. At the time it established the Yukon Delta National Wildlife Refuge, Congress established or enlarged 15 other refuges in Alaska. *See generally* ANILCA, §§ 302-303. And in almost every case, it did so out of concern for both the conservation of migratory waterfowl and the well-being of Alaska Natives who depend upon the subsistence harvest of migratory waterfowl and wildlife populations on refuge lands. To list but three examples: 109 species of migratory waterfowl from six continents nest on the Selawik National Wildlife Refuge in the northwest arctic, 117 species nest on the Yukon Flats National Wildlife Refuge in interior Alaska, and the Arctic National Wildlife Refuge in the northeast corner of Alaska is an important summer nesting ground for black brant. House Report at 107, 111, 116.

Native villages are located within or proximate to the aforementioned refuges, and migratory waterfowl hunting is an important Native subsistence activity within each

refuge. Like the Yukon Delta National Wildlife Refuge, Congress designated "the opportunity for continued subsistence uses by local residents" as a purpose of the aforementioned refuges, as well as all but one of the other refuges it established or enlarged in 1980.[6]

As result, if the instant petition is granted, the ultimate holding in this litigation will affect Alaska Natives in more than 200 villages, from Klawock, a Tlingit Indian village on the southern edge of the southeast Alaska rain forest, to Kaktovik, an Inupiat Eskimo village on the windswept coast of the Beaufort Sea in the northeastern corner of Alaska more than 1,000 miles north. It will also affect hundreds of migratory waterfowl populations other than the four which are the subject of the Hooper Bay Agreement and the YDGMP.

2. The Court of Appeals Decided a Question of Federal Law in a Way Which Conflicts with an Important Decision of This Court.

In addition to the public importance of the subject matter, the instant petition should be granted for a second reason: to correct the flawed methodology the court of appeals employed to determine the intent of Congress embodied in the Alaska Game Act; a methodology which is in conflict with an important decision of this Court.

Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984), sets forth the test for determining the intent of Congress

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[6]At the same time, Congress established or enlarged 13 national parks and preserves and designated "subsistence uses by local residents" as an authorized activity in most areas. *ANILCA*, §§ 201-202.

embodied in a statute. Justice Scalia has characterized *Chevron* as "an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeal." *I.N.S. v. Cardoza Fonseca*, 107 S.Ct. 1207, 1225 (1987) (Scalia, J. concurring).

In the instant case, the issue before the court of appeals was whether Congress intended the Secretary to regulate the taking of migratory waterfowl in Alaska pursuant to the Alaska Game Act, or pursuant to the MBTA. If Congress intended the Alaska Game Act to control, the Act exempts Native subsistence hunters from compliance with regulations establishing closed seasons.

Chevron required the court of appeals to analyze the text of the Alaska Game Act to determine whether Congress has directly spoken to the precise question at issue. If it has, and the intent of Congress is clear and unambiguous in the text, then regardless of FWS's interpretation of the Act "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, supra* at 842-843.

However, in reasoning to its preferred result, the court of appeals disregarded *Chevron*. The text of the Alaska Game Act is clear and unambiguous. Section 8, 48 U.S.C.A. § 195, prohibits any person to take any wild bird in Alaska "except as permitted by this Act or by regulations made pursuant to this Act." Section 2, 48 U.S.C.A. § 206, defines "take" to include the taking or killing of "game birds," and defines "game birds" to include "migratory waterfowl, commonly known as ducks, geese, brant, and swans." Section 10, 48 U.S.C.A. § 198, authorizes the Secretary to adopt regulations governing

when, to what extent, and by what means "game birds" may be taken. Lastly, and most importantly, § 10 requires regulations adopted pursuant to the Alaska Game Act not to "contravene any of the provisions of the migratory bird treaty Act and regulations."

It is simply impossible to read the text of the Act and conclude other than that Congress, having directly spoken to the precise question at issue, intended the Alaska Game Act, and regulations adopted pursuant to that Act, to control the taking of migratory waterfowl in Alaska. Nevertheless, the court of appeals decided otherwise. First, by asserting that "The 1925 AGL was ambiguous as to its relationship with the MBTA." App. 23. And then by relying on FWS's interpretation of the Act, even though it conceded at the outset of its analysis that "The interpretation of the statute by the Secretary is also ambiguous." App. 27.

Simply put, the court of appeals ignored elemental tenets of statutory construction set forth in *Chevron* to reach a result inconsistent with the clear and unambiguous text of an Act of Congress.[7] An error this Court should correct.

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[7]The court of appeals' conclusion that the Alaska Statehood Act repealed the Alaska Game Act insofar as the latter Act delegates the Secretary authority to adopt regulations governing the taking of migratory waterfowl in Alaska is similarly flawed. *See* App. 49-52.

3. The Court of Appeals Has Rendered a Decision That Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings As to Call for the Exercise of This Court's Power of Supervision.

The jurisdiction of the federal courts is limited to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. Since 1978 the petitioners and the federal respondent have disagreed as to whether § 3(h)(2) of the Fish and Wildlife Improvement Act, 16 U.S.C. § 712(1) (1978), delegates the Secretary authority to adopt regulations authorizing the indigenous inhabitants of the State of Alaska to take migratory waterfowl during spring and summer prior to the ratification of amendments to the Canadian and Mexican treaties. The petitioners believe the statute confers this authority. The Secretary did not.

To settle the matter, the petitioners' cross-claim requested the district court to adjudicate the dispute. However, the court declined the invitation. Since the authority to adopt regulations pursuant to § 3(h)(2) is discretionary, the district court concluded that until such time as the Secretary chose to exercise his discretion and adopt regulations "There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision." App. 53.

None of the parties appealed this holding. As a result, the issue was not briefed or argued before the court of appeals. In the meantime, while the appeal was pending, the Solicitor of the Department of the Interior reevaluted the intent of Congress embodied in § 3(h)(2). On May 19, 1986, FWS published a notice in the Fed-

eral Register announcing its intent "to propose regulations governing subsistence harvest of migratory birds in Alaska. These regulations will be based on provisions for such harvest in various laws, including the Fish and Wildlife Improvement Act of 1978. It is intended that the regulations will be adopted by spring of 1987. . . ." 51 Fed. Reg. 18,349 (1986).

Although FWS did not complete the rulemaking prior to the 1987 season, it intended to do so prior to the 1988 season. But the court of appeals derailed the effort. *See* 52 Fed. Reg. 49,449 (1987). Although it had not been asked to decide the question, the court gratuitously held that "the legislative history regarding the Fish and Wildlife Improvement Act makes clear that regulations permitting closed season hunting may not be adopted if they are contrary to any of the treaties." App. 19.

As the district court correctly concluded, the court of appeals decision that the Secretary does not presently have authority pursuant to § 3(h)(2) to adopt regulations authorizing the taking of migratory waterfowl in Alaska during the spring and summer is an advisory opinion. As such, it is an opinion the court had no jurisdiction to render. *Bell v. State of Maryland,* 378 U.S. 226, 273 (1964) (holding that the United States Supreme Court has a "constitutional inability to render advisory opinions."). *See also Buckley v. Valeo,* 424 U.S. 1, 11 (1982) (holding that Congress cannot require the courts to render opinions in matters that are not "cases or controversies.").

The aforementioned component of the court of appeals decision is a significant, indeed startling, departure from the accepted and usual course of judicial proceedings. As such, it calls for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: January 7, 1988

Respectfully submitted,

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Attorney for Petitioners

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., and THE ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC.,	
Plaintiffs-Appellants,	
v.	
	No. 86-3657
FRANK L. DUNKLE, Director, United States Fish and Wildlife Service, and DONALD COLLINSWORTH, Commissioner of the Alaska Department of Fish and Game,	D.C. No. CV-84-013-V
	OPINION
Defendants-Appellees,	
THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and TONY VASKA,	
Intervenors-Appellees.	

Argued and Submitted
November 7, 1986—Seattle, Washington

Filed October 9, 1987

Before: Otto R. Skopil, Jr. and Betty B. Fletcher, Circuit Judges, and John P. Vukasin, Jr.,* District Judge.

*Honorable John P. Vukasin, Jr., United States District Judge, Northern District of California, sitting by designation.

Opinion by Judge Skopil

Appeal from the United States District Court
for the District of Alaska

James A. von der Heydt, District Judge, Presiding

SUMMARY

Environmental Law/Administrative Law

Appeal from judgment. Reversed and remanded.

The hunting of migratory birds has resulted in a decline in their population. Appellee Fish and Wildlife Service has assumed that all harvesting of migratory birds between March 10 and September 1 of each year is prohibited by the Migratory Bird Treaty Act (MBTA). Enforcement was difficult. The Service adopted a policy stating that subsistence hunting in Alaska during the closed season would not be punished. In an effort to decrease sport and subsistence hunting during the closed season, the Service initiated negotiations with Alaskan Natives. A cooperative plan to reduce the hunting of three types of migratory birds was agreed to. This plan, the Hooper Bay Agreement, placed restrictions on subsistence hunting but did not prohibit it. In 1985 the Hooper Bay Agreement was replaced by a similar agreement, the 1985 Goose Management Plan. Shortly before the 1984 nesting season began, appellant Alaska Fish and Wildlife Conservation Fund filed legal action against the Service and the Alaska Department of Fish and Game (ADF&G) alleging that by entering into the Hooper Bay Agreement, the Service illegally permitted Alaskan Natives to engage in closed season hunting. It contended that this action violated the Migratory Bird Treaty Act (MBTA). The appellee Intervenors then filed a cross-claim against the

Service alleging that the 1925 Alaska Game Law (AGL) superseded the MBTA. It argued that Congress has, pursuant to the 1925 AGL, authorized Alaskan Natives to harvest migratory waterfowl during all seasons of the year if they are in need of food. The district court denied the Conservation Fund's request for a preliminary injunction. All parties' motions for summary judgment were stayed. In 1986 the court granted summary judgment in favor of the Intervenors.

[1] Appellants have satisfied the three prongs for standing. [2] A decision not to enforce a law is generally committed to an agency's absolute discretion. However, an agency's failure to act is reviewable where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. [3] The MBTA grants the Secretary of the Interior discretion to regulate the taking of migratory birds, but that discretion is limited to actions in accordance with the treaties the MBTA implements. This court has jurisdiction to determine whether the agency action was contrary to the provisions of the treaties, and thus to the MBTA. [4] This action is one of those cases in which the complained of activity may be repeated and yet evade review. [5] The MBTA makes all hunting of migratory birds unlawful unless the hunting is authorized by regulation adopted pursuant to the MBTA. [6] The legislative history makes clear that regulation permitting closed season subsistence hunting may not be adopted if they are contrary to any of the treaties. [7] The Secretary of the Interior is authorized to issue regulations permitting subsistence hunting, but only to the extent that the regulations are in accord with all four treaties. [8] All treaties protect the

migratory birds covered by the Hooper Bay Agreement and the 1985 Goose Management Plan. [9] Reviewing all the treaties, closed season subsistence hunting by Alaskan Natives is not permitted by the MBTA. [10] Because the MBTA prohibited all hunting of migratory birds between March 10 and September 1 of each year and the 1925 AGL permitted emergency subsistence during the entire year, the district court found that the clauses conflicted. The conflict was resolved by finding the 1925 AGL Superceded the MBTA with respect to the regulation of migratory birds hunting. [11] It is possible, however, to interpret the two clauses in section 10 so that they do not conflict and so that both provisions serve a purpose. [12] Subsequent administrative interpretation supports the view that the 1925 AGL did not supercede the MBTA and that the emergency hunting provision in the 1925 AGL did not govern the hunting of migratory game birds.

COUNSEL

Gregory F. Cook, Douglas, Alaska, for the plaintiffs-appellants.

James C. Kilbourne, Edward J. Shawaker, and J. Carol Williams, Washington, D.C., for Director, United States Fish and Wildlife Service, David A. Gayer, Washington, D.C., of counsel. Larri Irene Spengler, Juneau, Alaska, for the appellee State of Alaska.

Donald C. Mitchell, Anchorage, Alaska, for the intervenors-appellees.

OPINION

SKOPIL, Circuit Judge:

The Alaska Fish and Wildlife Conservation Fund and the Alaska Fish and Wildlife Federation and Outdoor Council ("the Conservation Fund"), appeal the district court's dismissal of its claims against defendants, Frank L. Dunkle, Director of the United States Fish and Wildlife Service ("Fish and Wildlife Service"), and Donald Collinsworth, Commissioner of the Alaska Department of Fish and Game ("ADF&G"). The Conservation Fund also appeals the district court's grant of summary judgment in favor of intervenors, the Alaska Federation of Natives, the Association of Village Council Presidents, and Alaska State Representative Tony Vaska ("Intervenors"), on their cross claims against the defendants.

The Conservation Fund seeks a declaration that two cooperative agreements (the "Hooper Bay Agreement" and the "1985 Goose Management Plan") entered into by the Fish & Wildlife Service, the ADF&G, the Association of Village Council Presidents, and the California Department of Fish and Game are void. They contend that the Fish & Wildlife Service failed to follow federal procedures before entering into the agreement and that the Hooper Bay Agreement and the 1985 Goose Management Plan illegally permitted closed season hunting by Alaskan Natives. As applied to subsistence hunting of migratory birds in Alaska, the district court determined that the 1925 Alaska Game Law ("1925 AGL"), 43 Stat. 739, superseded the 1918 Migratory Bird Treaty Act ("MBTA"), 40 Stat. 755 (codified at 16 U.S.C. §§ 703-711 (1982)). It held that a provision in the 1925 AGL preventing the De-

partment of Agriculture from placing restrictions on subsistence hunting continues in force today. For this reason, the district court concluded that the Fish and Wildlife Service has no authority to place restrictions on subsistence hunting by Alaskan Natives.

We first consider the procedural claims raised by the Fish and Wildlife Service and ADF&G. We conclude that the Conservation Fund has standing to pursue its claims and that a decision in favor of the Conservation Fund would not infringe on the prosecutorial discretion of the Fish and Wildlife Service. We also conclude that this action is not moot.

We reverse the district court's decision as to the applicability of the 1925 AGL to the hunting of migratory game birds in Alaska. We hold that the MBTA governs the hunting of migratory birds and that the MBTA currently does not permit closed season subsistence hunting of migratory game birds by Alaskan Natives. We remand to the district court to determine whether the Hooper Bay Agreement and the 1985 Goose Management Plan violate the provisions of the MBTA.[1]

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[1]We do not resolve whether the government's failure to comply with the notice and comment provisions of the Administrative Procedure Act or the National Environment Policy Act invalidates the Hooper Bay Agreement or the 1985 Goose Management Plan. Those issues must first be resolved by the district court.

Nor is it necessary for us to determine whether the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 668dd, provides an independent basis for restricting subsistence hunting. Having determined that the MBTA requires the government to comply with its international treaty obligations, we do not need to consider whether ANILCA also places this obligation on the government in its operation of the Yukon Delta National Wildlife Refuge.

FACTS AND PROCEEDINGS BELOW

This case concerns the hunting of migratory birds on the Yukon-Kuskokwim Delta ("Delta"). In early March, migratory birds, including Cackling Canada Geese, White Fronted Geese, Pacific Black Brant, and Emperor Geese, arrive on the Delta. During the spring and summer months the birds nest and raise their young. In early September the birds migrate south.

The birds represent an important part of the traditional Native diet. Upon arrival in the spring, the migratory birds provide Delta Natives with the first available fresh meat after the long winter.

Hunting by Delta Natives, along with hunting by sportsmen, loss of habitat, and natural predation, has resulted in a decline in the migratory bird population. This decline has concerned conservationists since the turn of the century and has become increasingly severe. All parties agree that extraordinary measures are necessary to reverse the current trend.

The Fish and Wildlife Service has assumed that all harvesting of migratory birds between March 10 and September 1 of each year is prohibited by the MBTA. In recent years, however, the Fish and Wildlife Service has not made an effort in Alaska to ensure compliance with the MBTA. Political and geographical considerations have led the Service to conclude that traditional methods of enforcing game laws are not effective in the vast reaches of rural Alaska. In 1975 the Service adopted a written policy stating that subsistence hunting in Alaska during the closed season would not be punished.

In an effort to decrease sport and subsistence hunting during the closed season, the Fish and Wildlife Service initiated negotiations with Alaskan Natives. In January 1984 the Fish and Wildlife Service, the ADF&G, the Association of Village Council Presidents, and the California Department of Fish and Game agreed to a cooperative plan to reduce the hunting of three types of migratory birds. This plan, known as the Hooper Bay Agreement, prohibited sport hunting of Cackling Canadian Geese and reduced the hunting of White Fronted Geese and Black Brants during the 1985 hunting season. The Agreement placed restrictions on subsistence hunting, but did not prohibit this activity. Enforcement of the Hooper Bay Agreement was to be accomplished jointly by the various governmental agencies and local village councils. During 1984 the parties complied with the terms of the Agreement. In 1985 the Hooper Bay Agreement was replaced by a similar agreement, the 1985 Goose Management Plan.

Shortly before the 1984 nesting season began, the Conservation Fund filed legal action against the Fish and Wildlife Service and the ADF&G. The Conservation Fund alleged that by entering into the Hooper Bay Agreement, the Fish and Wildlife Service illegally permitted Alaskan Natives to engage in closed season hunting. It contended that this action violated the MBTA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559 (1982), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4361 (1982). The Conservation Fund sought an injunction to prohibit the Fish and Wildlife Service from acquiescing in the taking of migratory birds during the 1984 closed hunting season. It also requested declaratory relief to require the Fish and Wildlife Ser-

vice to comply with APA and NEPA before entering into further agreements and to develop a comprehensive plan for reducing the harvest of the endangered species.

Shortly thereafter, the Intervenors filed a cross-claim against the Fish and Wildlife Service. The cross-claim alleged, in relevant part, that the 1925 AGL rather than the MBTA governs the subsistence hunting of migratory game birds in Alaska. The Intervenors argued that the 1925 AGL superceded the MBTA and that until the Secretary of the Interior adopts regulations pursuant to the 1978 Fish and Wildlife Improvement Act ("Fish and Wildlife Improvement Act"), 16 U.S.C. § 712 (1982), Congress has, pursuant to the 1925 AGL, authorized Alaskan Natives to harvest migratory waterfowl during all seasons of the year if they or members of their family are in need of food and other sufficient food is not available.

The district court denied the Conservation Fund's request for a preliminary injunction for the 1984 season. All parties then filed motions for summary judgment. In the spring of 1985 the district court stayed the case through the 1985 nesting season. The district court ordered the Fish and Wildlife Service and the Intervenors to report to the court regarding the effectiveness of the 1985 Goose Management Plan. The reports were received, and in January 1986 the court granted summary judgment in favor of the Intervenors.

The court ruled that the Fish and Wildlife Service may not restrict subsistence hunting activities by Alaskan Natives. It concluded that the 1925 AGL repealed the MBTA insofar as the MBTA applied to Alaska. It held, however, that all of the MBTA's terms except for its re-

striction on subsistence hunting were incorporated into the 1925 AGL. Because the 1925 AGL permitted subsistence hunting by Alaskan Natives and no subsequent legislation modified the subsistence hunting provision in the 1925 AGL, the district court held that the Hooper Bay Agreement and the 1985 Goose Management Plan had no legal effect. The court declined to address whether the Secretary has authority under the Fish and Wildlife Improvement Act to restrict subsistence hunting because the Fish and Wildlife Service has not yet issued regulations pursuant to that Act. The district court concluded that the Conservation Fund's APA and NEPA claims were moot because the two agreements had no legal effect.

The Conservation Fund argues that the district court incorrectly found that the 1925 AGL superceded the MBTA with respect to subsistence hunting of migratory birds in Alaska. It seeks a declaratory ruling that the Hooper Bay Agreement and the 1985 Goose Management Plan are contrary to the MBTA because they permit subsistence hunting. The Conservation Fund also seeks to compel the Fish and Wildlife Service to adopt measures restricting subsistence hunting. Although the Fish and Wildlife Service and ADF&G argued below that the 1925 AGL does not supersede the MBTA, they have not appealed the district court's decision. They argue instead that the Conservation Fund does not have standing to challenge the participation of the Fish and Wildlife Service in cooperative agreements concerning subsistence hunting of migratory birds. In the alternative, they argue the action should be dismissed because the Conservation Fund seeks to infringe on the prosecutorial discretion of the Fish and Wildlife Service.

DISCUSSION

I.

A. *Standing.*

The Fish and Wildlife Service and ADF&G argue that the Conservation Fund's claims should be dismissed for lack of standing. Although argued, the issue of standing was not addressed in the district court's decision. Standing is a threshhold question in every case. *Olagues v. Russoniello,* 797 F.2d 1511, 1517 (9th Cir. 1986) (en banc), *cert. granted,* 107 S.Ct. 1885 (1987).

[1] The test for standing is not precise. *Allen v. Wright,* 468 U.S. 737, 751 (1984). Nevertheless, we have some guidance. A plaintiff's claim must include three allegations: (1) a personal injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the requested relief. *Id.*

Courts have found personal injury in a variety of settings in which recreational or aesthetic uses of natural resources are at stake. Non-economic criteria are as valid a measure of personal injury as economic criteria. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686 (1973); *Sierra Club v. Morton,* 405 U.S. 727, 734 (1972); *Port of Astoria v. Hodel,* 595 F.2d 467, 476 (9th Cir. 1979); *Trustees for Alaska v. Watt,* 524 F. Supp. 1303, 1307 (D. Alaska 1981), *aff'd,* 690 F.2d 1279 (9th Cir. 1982). A plaintiff must allege use of the resources in a way that will be significantly affected by the proposed actions. *See Sierra Club,* 405 U.S. at 735. In this case the Conservation Fund alleged a personal injury to its members. The decrease in the number

of certain species of migratory birds has harmed the environment. The harm has injured those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds. These injuries can be measured in both economic and non-economic terms.

The Conservation Fund has also shown that the injury of which it complains is traceable to the actions of the defendants and that there is a substantial likelihood that declaratory relief would redress the injury. The requirement of a causal link and redressability are closely related. *See Railway Labor Executives Ass'n v. Dole,* 760 F.2d 1021, 1023 (9th Cir. 1985); *see also Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 72-78 (1978). If, as alleged by the Conservation Fund, the Hooper Bay Agreement and the 1985 Goose Management Plan permit illegal subsistence hunting, the injury is traceable to the actions of the government. The parties do not dispute the district court's finding that subsistence hunting is one cause of the decline in the migratory bird population. There is a substantial likelihood that declaratory relief in the form of a declaration that close-season subsistence hunting violates federal law will redress the injury.

The Conservation Fund is also a proper representative of those who are injured. An association may enjoy standing on behalf of its members if: " '(a) it members would otherwise have standing in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.' " *International Union, Auto. Aerospace & Agricultural Implement Workers v. Brock,* 106

S. Ct. 2523, 2529 (1986) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). All three prongs of the test are satisfied. First, the Conservation Fund's members use the resources in question and have been injured by the decrease in the migratory bird population. Second, preventing the extinction of migratory gamebirds is germane to the association's purpose of participating in "litigation in the courts when necessary to protect the beneficial pursuits of hunting . . . and scientific wildlife management practices." Third, because the Fund seeks declaratory and prospective relief rather than money damages, its members need not participate directly in the litigation. *See Alagues*, 797 F.2d at 1519.

The Conservation Fund has adequately established that it is a proper representative of the injured and that the injury suffered is traceable to the defendants. The relief requested, although not a complete solution, would help to prevent the current decline in the migratory population. Appellants have standing to pursue their claim.

B. *Discretion to Prosecute.*

[2] The Fish and Wildlife Service and the ADF&G argue that the Conservation Fund's claims should be dismissed because any result in favor of the Fund would infringe on the enforcement and prosecutorial discretion of the Service. Failure of an agency to prosecute is presumptively not reviewable under the APA. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also Railway Labor Executives Ass'n*, 760 F.2d at 1024-25. In *Chaney*, the Supreme Court held that the presumption of reviewability normally accorded to agency actions does not apply to an agency's decision not to prosecute or enforce a law. *Cha-*

ney, 470 U.S. at 831-32. A decision not to enforce a law is generally committed to an agency's absolute discretion. *Id.* An agency's failure to act is reviewable "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833 (footnote omitted).

The Conservation Fund contends that the Fish and Wildlife Service has abrogated its statutory duty to enforce the closed hunting season required by the MBTA. To the extent that the Service's failure to act is the basis of the Conservation Fund's claim, we lack jurisdiction under the APA to consider the claim. The MBTA explicitly delegates the authority to adopt regulations and discretionary enforcement powers to the Secretary of the Interior. *See* 16 U.S.C. §§ 704, 712. The discretion granted to the Fish and Wildlife Service precludes our review of the Service's failure to enforce the MBTA.

[3] The Conservation Fund does not, however, rely solely on the Fish and Wildlife Service's failure to enforce the MBTA as the basis for its claim. It also complains that by entering into the Hooper Bay Agreement and the 1985 Goose Management Plan the Fish & Wildlife Service violated the MBTA. Such actions are reviewable, *see Chaney,* 470 U.S. at 831; *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971), unless the agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). The MBTA grants the Secretary of the Interior discretion to regulate the taking of migratory birds, but that discretion is limited to actions in accordance with the treaties the MBTA implements. *See* 16 U.S.C. 712(1). We have jurisdiction to determine whether the agency action, entry into the Hooper Bay Agreement and the 1985

Goose Management Plan, was contrary to the provisions of the treaties and thus to the MBTA.

C. *Mootness*

The Hooper Bay Agreement was signed in 1984 and governed the 1985 hunting season. The 1985 Goose Management Plan replaced the Hooper Bay Agreement and remained in force until the end of 1986. We have not been informed whether any agreement was entered into for the 1987 season but do not believe this to be a relevant factor. The 1985 district court decision that the Fish & Wildlife Service had no authority to restrict subsistence hunting by Alaskan Natives would have made any cooperative agreement unenforceable.[2]

"Judicial review of administrative action . . . is limited by the requirement that there be an actual, live controversy to adjudicate." *Campesino Unidos, Inc. v. United States Dep't of Labor*, 803 F.2d 1063, 1067 (9th Cir. 1986) (citing *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983)). We recognize an exception to the mootness doctrine if the government's actions are capable of repetition but will evade review. *See, e.g., Olagues*, 797 F.2d at 1516. The doctrine is limited to extraordinary cases in which: "(1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there

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[2]ADF&G argues that the issuance by the Fish and Wildlife Service of a notice of its intent to propose regulations for subsistence harvesting of migratory birds pursuant to the 1978 Fish and Wildlife Improvement Act indicates that the issues involved in the case will soon be moot. See 51 Fed. Reg. 18,349-50 (1986); 51 Fed. Reg. 26,029 (1986). The Fish and Wildlife Service has not issued the expected regulations. We therefore decline to reach this issue.

is a reasonable expectation that the plaintiffs will be subjected to the same action again." *Id.* Moreover, "[t]he existence of a 'public interest in having the legality of the practices settled . . . militates against a mootness conclusion.' " *Id.* at 1517 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

[4] This action is one of those extraordinary cases in which the complained of activity may be repeated and yet evade review. First, the cooperative agreements challenged in this action were of only one year's duration. It is difficult to obtain judicial review during the duration of a one-year agreement. Second, we find that the Conservation Fund has met its burden of showing a sufficient likelihood that there will continue to be injurious actions relating to the official sanctioning of closed-season hunting. *See Olagues*, 797 F.2d at 1516 (holding that "voluntary cessation of the challenged activity is insufficient to render a case moot if the legality of the challenged practices' is still disputed because '[t]he [official] is free to return to his old ways' " (quoting *W.T. Grant Co.*, 345 U.S. at 362)). *See generally, Sample v. Johnson*, 771 F.2d 1335, 1340-43 (9th Cir. 1985) (discussing injury requirement), *cert. denied*, 106 S. Ct. 1206 (1986). In addition, questions concerning the authority of the Fish and Wildlife Service to regulate the subsistence hunting of migratory birds are likely to recur each year if not settled by this court. *See United States v. Oregon*, 769 F.2d 1410, 1414 (9th Cir. 1985) (and cases cited therein) (dispute concerning fishing regulations adopted annually not moot). Finally, the public interest in having this dispute resolved is strong. The parties are unsure which laws govern the

subsistence hunting of migratory game birds in Alaska. Unless the law is clarified it may not be possible to develop a program that addresses the population decline of migratory birds.

II.

The Fish and Wildlife Service has assumed that the hunting of migratory birds in Alaska is governed by the MBTA and its implementing regulations. *See* 16 U.S.C. §§ 701-712; 50 C.F.R. §§ 20.1-20.155 (1987). Neither the MBTA nor the implementing regulations permit subsistence hunting of migratory game birds by Alaska Natives during the closed season. The district court concluded, however, that a provision in the 1925 AGL which prohibited the adoption of regulations restricting subsistence hunting unless the hunted species was in danger of extinction remains in force today. Despite a convincing argument that the 1925 AGL was repealed when Alaska became a state, the district court held that the subsistence hunting provision continues in force today.

A. *Standard of Review.*

A grant of summary judgment is reviewed de novo. *Alaska v. Lyng,* 797 F.2d 1479, 1481 (9th Cir. 1986), *cert. denied,* 107 S. Ct. 1603 (1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir. 1986). The construction of a statute is a question of law reviewable de novo. *Lyng,* 797 F.2d at 1481.

. *The 1918 Migratory Bird Treaty Act*

The MBTA was enacted in 1918 to implement a con-
vention between the United States and Great Britain pro-
tecting migratory birds. *See* Convention for the Protection
of Migratory Birds, August 16, 1916, United States-Great
Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628
[hereinafter United States-Canada Convention]. By en-
acting the MBTA, Congress obtained regulatory authority
over migratory birds which previously had been held by
the individual states. *See Missouri v. Holland*, 252 U.S.
416 (1920). The MBTA has since been amended to imple-
ment conventions which the United States has signed with
Mexico, Japan, and the Soviet Union. *See* Convention for
the Protection of Migratory Birds and Game Mammals,
February 7, 1936, United States-Mexico, 50 Stat. 1311,
T.S. No. 912; Convention for the Protection of Migratory
Birds and Birds In Danger of Extinction and Their En-
vironment, March 4, 1972, United States-Japan, 25 U.S.T.
3329, T.I.A.S. No. 7990; Convention Concerning the Con-
servation of Migratory Birds and Their Environment,
November 19, 1976, United States-USSR, 29 U.S.T. 4647,
T.I.A.S. No. 9073.

[5] The MBTA makes all hunting of migratory birds
unlawful unless the hunting is authorized by regulations
adopted pursuant to the MBTA. 16 U.S.C. § 703. The
statute authorizes the Secretary of the Interior to adopt
regulations governing the hunting of migratory birds. 16
U.S.C. § 704. The Secretary is granted broad discretion
in determining the content of the regulations, but is sub-
ject to the provisions and the purposes of the conventions.
Id. The Department of the Interior is also granted en-
forcement powers. 16 U.S.C. § 706.

The MBTA was amended in 1978 by the Fish and Wildlife Improvement Act to implement the United States-USSR Convention. The amendment added for the first time a statutory reference to subsistence hunting by Alaskan Natives.[3] The amendment allows the Secretary of the Interior to adopt regulations permitting subsistence hunting by Alaskan Natives if the regulations are in accordance with the provisions of the four treaties. 16 U.S.C. § 712.

[6] Although the parties dispute whether the Fish and Wildlife Improvement Act requires the Secretary's regulations to be in accord with only the United States-USSR Convention or whether the regulations must be in accordance with all four treaties, the legislative history regarding the Fish and Wildlife Improvement Act makes clear that regulations permitting closed season subsistence hunting may not be adopted if they are contrary to any of the treaties. *See* S. Rep. No. 1175, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 7641 [hereinafter *Hearings*]. The legislative history shows, first, that Congress is in favor of permitting some subsistence hunting by Alaskan residents. The Senate Re-

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[3]The relevant provision provides:

(1) In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the USSR, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

16 U.S.C. § 712(1).

port states that "the subsistence provisions of the three earlier treaties lack the administrative flexibility necessary to deal with the issue in a responsible manner. In contrast to these earlier inadequacies, the USSR convention contains the most modern and workable language on subsistence and avoids the errors of the past." *Hearings* at 7645. Second, the legislative history shows that Congress believed amendment of the treaties with Canada, Mexico, and Japan was necessary before regulations permitting subsistence hunting could be adopted. Senator Gravel, speaking in favor of the Fish and Wildlife Improvement Act before the Senate, stated that "*as soon as* these other treaties can be amended by our negotiators and ratified, we can at least put to rest one of the most longstanding, volatile issues facing rural Alaskan users of migratory birds." 124 Cong. Rec. 31,532 (1978) (emphasis added). Third, the statutory amendment was enacted in anticipation of treaty modifications that the executive was then seeking to negotiate. *See Hearings* at 7645. Congress wanted to avoid the necessity of amending the MBTA each time a treaty was amended. *Id.*

[7] The treaties with Canada, Mexico, and Japan have not been modified.[4] Thus, the Secretary of the Interior is authorized to issue regulations permitting subsistence hunting, but only to the extent that the regulations are in accord with all four treaties.

[8] Subsistence hunting is regulated differently by each convention. The four treaties use different means to

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[4]A protocol modifying the United States-Canada Convention was signed but never ratified by the Senate. *See* Protocol Amending the 1916 Convention with Canada for the Protection of Migratory Birds (January 30, 1979), S. Doc. Executive W, 96th Cong., 2d Sess. (1980).

designate which birds are protected by the particular treaty, but all treaties protect the migratory birds covered by the Hooper Bay Agreement and the 1985 Goose Management Plan. *See* United States-Canada Convention, art. I; United States-Mexico Convention, art. IV; United States-Japan Convention, Annex 38, 39, 41; United States-USSR, Appendix. *See also* 50 C.F.R. § 10.13 (1986). The United States-Canada Convention requires a closed season between March 10 and September 1 of each year and limits the open season to three and one-half months. *See* United States-Canada Convention, art. II(1). It contains exceptions for Indians and Eskimos, but these exceptions do not apply to the hunting of the birds named in the Hooper Bay Agreement or the 1985 Goose Management Plan. *Id.* at art. II(3). The United States-Mexico Convention does not set dates for a closed season, but states that the open season may not exceed four months each year. *See* United States-Mexico Convention, art. II(A), (C). The United States-Mexico Convention does not mention subsistence hunting by Alaskan Natives. The United States-Japan Convention does not require a specific closed season. Instead, it provides that each country shall set its hunting season "so as to avoid [the birds'] principal nesting seasons and to maintain their populations in optimum numbers." *See* United States-Japan Convention, art. III(2). A subsistence hunting provision is specifically included, but its application is restricted to "Eskimos, Indians and indigenous peoples of the Pacific Islands" if the taking is for their own food and clothing. United States-Japan Convention, *Id.* at art. III(1)(e). The United States-Soviet Union Convention explicitly provides for subsistence hunting by Alaskan Natives. *See* United

States-Soviet Convention, art. II(1)(c). It permits the Secretary to set a specific hunting season for subsistence hunting by Alaskan Natives. *Id.* at Art. II(2). This season must provide for the preservation and maintenance of stocks of migratory birds. United States-Soviet Convention, *Id.*

[9] The United States-Canada Convention is the most restrictive of the four treaties, and all of the Secretary's regulations must be in accord with that treaty. Therefore the Secretary may adopt regulations that permit subsistence hunting for up to three and one-half months between September 1 and March 10 of each year. Closed season subsistence hunting by Alaskan Natives is not permitted by the MBTA.

C. *The 1925 Alaska Game Law*

The district court held, however, that closed season subsistence hunting by Alaskan Natives is not regulated by the MBTA, but instead by the 1925 Alaska Game Law. It concluded that the 1925 AGL superceded the MBTA with respect to the hunting of migratory birds in Alaska and that the 1925 AGL prohibits the Secretary from adopting regulations restricting closed season subsistence hunting by Alaskan Natives. The district court held that this prohibition remains in force today.

The district court held that the 1925 AGL repealed the MBTA both by its plain language and by implication. The 1925 AGL regulated the hunting of various types of animals and birds in Alaska, including migratory game birds. 1925 AGL § 8. The Law created an Alaska Game Commission and delegated to the Commission substantial en-

forcement authority over hunting in Alaska. 1925 AGL §§ 4, 5. The Law provided that, unless permitted by it or regulations made pursuant to the 1925 AGL, it was unlawful to hunt migratory birds. 1925 AGL § 8. The Secretary of Agriculture was granted the authority to issue regulations permitting the hunting of game birds. 1925 AGL § 10.

The 1925 AGL was ambiguous as to its relationship with the MBTA. In section 10 it explicitly prohibited the Secretary from adopting regulations contravening the MBTA.[5] Section 16 of the 1925 AGL, however, could be read as an implicit repeal of the MBTA as it applied to Alaska. Section 16 stated that preexisting legislation relating to the protection of birds in Alaska would only remain in force until ninety days after regulations had been issued pursuant to the 1925 AGL.[6] The 1925 AGL also con-

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[5]The relevant section reads in part:

> nor, except as herein provided, shall [any regulation] prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, . . . but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

1925 AGL § 10.

[6]Section 16 states:

> [t]hat the provisions of existing laws relating to the protection of . . . birds, and nests and eggs of birds in the Territory shall remain in full force and effect until the expira-

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tained a provision in section 10 that prevented the Secretary from issuing regulations that prohibited Eskimos and Indians from taking birds during the closed season when other food was not available unless the Secretary determined that the particular species was in danger of extermination.

[10] The district court began its analysis by holding that the two clauses in section 10 conflict. One clause proscribed restrictions on emergency subsistence hunting. The other clause prohibited regulations conflicting with the MBTA. Because the MBTA prohibited all hunting of migratory game birds between March 10 and September 1 of each year and the 1925 AGL permitted emergency subsistence during the entire year, the district court found that the clauses conflicted. The district court resolved the conflict by concluding that the 1925 AGL superceded the MBTA with respect to the regulation of migratory bird hunting in Alaska. It found that the 1925 AGL was intended to "comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. The court relied on section 8 of the 1925 AGL which stated all taking of game animals and birds was illegal unless permitted by this Act or by regulations made pursuant to this Act.[7]

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tion of ninety days from the date of the publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

1925 AGL § 16.

[7]Section 8 provides in relevant part:

[t]hat, unless and except as permitted by this Act or by regulations made pursuant to this Act, it shall be unlawful for

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From this statement the district court concluded that the general repealing clause in section 16 expressly repealed the MBTA insofar as the MBTA applied to Alaska. The district court attempted to harmonize section 16 with section 10's provision that the MBTA was not to be contraveend. It held that the MBTA was incorporated by reference into the 1925 AGL and that the MBTA still applied to Alaska to the extent that it was not inconsisent with the 1925 AGL. In the alternative, the district court found that the 1925 AGL repealed the MBTA's applicability to Alaska by implication. It relied on the principle that ambiguities in statutes intended to benefit natives must be resolved in favor of natives and the principle that a specific locally oriented clause such as the emergency taking clause is presumed to control over a more general statute such as the MBTA.

When interpreting a statute, "we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). It is a rule of statutory construction that "one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." *Shields v. United States*, 698 F.2d 987, 989 (9th Cir.), *cert. denied*, 464 U.S. 816 (1983). "[W]e must examine the language of the statute and the particular con-

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any person to take, possess, sell, offer to sell, purchase or offer to purchase any game animal, land fur-bearing animal, wild bird, or any parts thereof, or any nest or egg of any such bird, ...

1925 AGL § 8.

cerns which motivated Congress to pass it." *Hopi Tribe v. Watt*, 719 F.2d 314, 317 (9th Cir. 1983).

[11] It is possible to interpret the two clauses in section 10 so that they do not conflict and so that both provisions serve a purpose. The subsistence hunting provision fairly can be read to permit subsistence hunting of all animals and all birds which are not migratory. Emergency subsistence hunting of migratory birds would then be permissible insofar as it is permitted by the MBTA. Because the MBTA allows subsistence hunting of some migratory nongame birds, both clauses would be given effect.

The legislative history of the 1925 AGL does not clarify the relationship between these two clauses. *See* H.R. Rep. No. 993, 68th Cong., 1st Sess. (1924); S. Rep. No. 480, 68th Cong., 1st Sess. (1924). The legislative reports do not refer to subsistence hunting by Alaskan Natives or to the MBTA. The reports do, however, delineate the policies which Congress intended to promote by adopting the 1925 AGL. Among those policies were flexibility in meeting local needs and conservation of the natural resources of the area. *See e.g.*, S. Rep. No. 480 at 4. These policies support an interpretation of the emergency hunting provision that recognizes the emergency subsistence needs of Alaskan Natives but which also restricts the subsistence hunting of migratory birds.

If the two clauses of section 10 are not in conflict, the district court's conclusion that section 16 repealed all prior legislation specifically addressed to the Territory of Alaska but not legislation protecting animals nationwide, is called into doubt. We must ascertain and

give effect to the plain meaning of the statute. *See Kidd v. United States Dep't of Interior,* 756 F.2d 1410, 1412 (9th Cir. 1985). Because the statute specifically stated that the provisions of the MBTA were not to be contravened, the plain language of the statute suggests that section 16 did not repeal the MBTA insofar as it applied to Alaska.

The interpretation of the statute by the Secretary is also ambiguous, but it provides some guidance in determining Congress' intent when it adopted the 1925 AGL. We give great deference to the interpretation given a statute by the agency charged with its administration. *Udall v. Tallman,* 380 U.S. 1, 16 (1965). Although it is unclear how the agency initially interpreted the 1925 AGL, the agency's longstanding interpretation has been that Congress did not intend to permit subsistence hunting of migratory game birds or to have the 1925 AGL supercede the MBTA.

We are particularly deferential to the contemporaneous interpretation given to a statute by those responsible for its implementation. *See Watt v. Alaska,* 451 U.S. 259, 272-73 (1981); *Udall,* 380 U.S. at 16 (quoting *International Union of Elec. Radio & Machine Workers,* 367 U.S. 396, 408 (1961)). Four months after the 1925 AGL was passed, the Bureau of Biological Survey issued regulations implementing the 1925 AGL. *See* U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, issued May 1925. These initial regulations do not conclusively establish whether the agency believed emergency subsistence hunting was per-

missible or whether the 1925 AGL superceded the MBTA in Alaska. Regulation 8 permitted the taking of animals and birds by Indians and Eskimos who had not severed tribal relations if they were in absolute need of food.[8] This regulation contained no limitations as to the time of year when subsistence hunting could take place or as to which birds could be hunted. The regulations also contained an introductory statement which stated that the 1925 AGL did not supersede the MBTA.[9] While it is unclear what authority this introductory statement was intended to carry, its inclusion with the regulations shows an agency intent that the MBTA continue in effect. Thus,

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[8]Regulation 8. Taking of Game by Prospectors, Travelers, and Certain Indians when in Need of Food

An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, Issues May 1925.

[9]The regulations stated:

> The Alaska game law (act of January 1925) and the regulations thereunder supersede all previous Federal laws and regulations for the protection of game animals, land fur-bearing animals, and birds in the Territory, *except the migratory-bird treaty act of July 3, 1918 (40 Stat. 755)*, the Lacey Act of May 25, 1900, as amended (31 Stat. 18-88; 35 Stat. 1137), and the law protecting animals and birds on Federal refuges (42 Stat. 98), and the regulations thereunder.

U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, Issues May 1925 (emphasis added).

the initial regulations show an intent to permit emergency subsistence hunting but to also follow the restrictive provisions of the MBTA.

The regulations issued pursuant to the MBTA in 1926, shortly after the 1925 AGL was enacted, continued to regulate the hunting of migratory birds in Alaska and to permit subsistence hunting of the migratory nongame birds as required by the United States-Canada Convention. *See* Presidential Proclamation of June 18, 1926, 44 Stat. 2579-81, *amending* Presidential Proclamation of July 31, 1918, 40 Stat. 1812-18. The MBTA regulations were not altered in any way to account for passage of the 1925 AGL. *See Id.*

[12] Subsequent administrative interpretation supports the view that the 1925 AGL did not supercede the MBTA and that the emergency hunting provision in the 1925 AGL did not govern the hunting of migratory game birds. First, regulations issued after 1926 under the MBTA have continued without exception to govern the hunting of migratory birds in Alaska. *See e.g.*, 50 C.F.R. § 20.102 (1986). The only subsistence hunting exceptions in the MBTA regulations are those authorized by the four treaties. *See id.* § 20.132.

Second, the Secretary of the Interior modified regulation 8 in 1944 to make clear that the regulation did not permit the taking of migratory game birds in contravention of the MBTA.[10] The revised regulation resolved the

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[10]*See* 50 C.F.R. § 91.3 (1944), *printed at* 9 Fed. Reg. 5270, 5271 (1944):

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ambiguity that previously existed. Although we give less deference to a subsequent agency interpretation which conflicts with that agency's contemporaneous interpretation, *see Watt v. Alaska*, 451 U.S. 259, 273 (1981); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976), we do not believe that this case is one in which we need question the later interpretation. The revised regulation continued in force for the next sixteen years with only minor modifications. There is no evidence that the change in the regulation resulted from a changed interpretation of the 1925 AGL. Rather, it is likely that the revised regulation simply clarified the interpretation given to the statute initially.

Third, administrative action at the time Alaska became a state shows that both the agency and Congress believed that the MBTA governed subsistence hunting of migratory game birds in Alaska. Although the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958), *reprinted at* 48 U.S.C. prec. § 21, did not expressly repeal the 1925 AGL, the 1925 AGL was considered repealed under a general repealing clause. *See* 72 Stat. 339, § 8(d); *see also* Executive Order No. 10,857, 25 Fed. Reg. 33 § 1 (1960) (stating that functions performed by the United States

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Taking animals, birds, and game fishes in emergencies. An Indian or Eskimo, or an explorer, prospector or traveler, may take animals, *birds except migratory birds,* or game fishes in any part of the Territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish or part thereof so taken, and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing for his own use and that of his immediate family.

(emphasis added).

would cease to be performed as of Dec. 31, 1959); Proposed Rulemaking: General Revision of Fish and Wildlife Regulations, 25 Fed. Reg. 7681, (1960) (stating that the 1925 AGL's implementing regulations would be deleted because they were "superceded by operation of the Alaska Statehood Act"). We find no evidence that the repeal of the 1925 AGL authorized the State of Alaska to regulate the hunting of migratory game birds by Alaskan Natives. The federal government continued to regulate the subsistence hunting of migratory birds pursuant to the MBTA based on its belief that it had always had this authority.

We hold that the MBTA was not superseded in Alaska by the 1925 Alaska Game Law. The subsistence hunting provision in the 1925 AGL prohibited the adoption of regulations restricting subsistence hunting of animals and non-migratory birds in Alaska. Thus, the MBTA and not the 1925 AGL governs the hunting of migratory birds. The MBTA permits the Secretary to adopt regulations permitting subsistence hunting only to the extent that the hunting is permissible under the treaties with Canada, Mexico, Japan, and the Soviet Union. We reverse and remand to the district court to determine whether the Hooper Bay Agreeemnt and the 1985 Goose Management Plan are contrary to the MBTA.

CONCLUSION

We conclude that the Conservation Fund has standing to bring this action. This action is not moot, but our jurisdiction is limited under the APA to a review of the authority of the Fish and Wildlife Service to enter into the

Hooper Bay Agreement and the 1985 Goose Management Plan.

We hold that the MBTA governs the subsistence hunting of migratory birds in Alaska. The MBTA was not superceded by the 1925 AGL. As in force today, the MBTA permits the Secretary of Interior to adopt regulations permitting subsistence hunting of migratory game birds. These regulations may not, however, contravene the treaties with Canada, Japan, Mexico, or the Soviet Union. To the extent that the Hooper Bay Agreement and the 1985 Goose Management Plan conflict with the provisions of the four treaties, they are invalid.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC. and ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC., Plaintiffs, v. ROBERT JANTZEN, Director, United States Fish and Wildlife Service, and DON COLLINSWORTH, Commissioner, Alaska Department of Fish and Game, Defendants. and THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and STATE REPRESENTATIVE TONY VASKA, Intervenors/Defendants.	MEMORANDUM AND ORDER

J84-013 CIV

I. *Background*

THIS CAUSE comes before the court on the parties' cross motions for summary judgment. It concerns issues

of game management and Native subsistence hunting in the Yukon-Kuskokwim delta. Four species of migrating birds, the cackling Canada goose, the emperor goose, the white-fronted goose, and the black brant, have suffered major declines in population over the last 20 years. All parties agree that unless these declines are reversed, the species' populations may fall to dangerously low levels. As of 1983, the estimated populations are as follows: cackling Canada goose—30,000; white-fronted goose—113,000; blank brant—110,000; and emperor goose—71,000. Approximate estimates for 1984 are: cackling Canada goose—30,000; white-fronted goose—100,000; black brant—133,000; and emperor goose—71,000. These numbers are necessarily approximate, given that geese do not fill out census forms.

The Yukon-Kuskokwim delta is a major summer nesting ground for these species. The species traditionally have been hunted by Natives in the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet. The evidence before this court indicates that this harvesting—along with hunting by sportsmen, loss of habitat, and natural predation—has been a major cause of the population decline.

Such spring hunting is potentially illegal under the terms of the migratory bird treaty between the United States and Canada and the Migratory Bird Treaty Act of 1918 (MBTA), which implements that treaty's provisions in the United States. *See* United States-Great Britain Convention for the Protection of Migratory Birds, August

16, 1916, 39 Stat. 1702, T.S. 628 (Canada Treaty); Migratory Birds Treaty Act of 1918, Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)). Both state and federal law enforcement officials have assumed spring taking of geese by Natives to be illegal, but in recent years virtually no effort has been made to enforce compliance. As was found by this court in denying plaintiffs' motion for preliminary injunction, traditional methods of enforcing game laws have not been effective in the vast reaches of rural Alaska for both political and geographical reasons.

In January, 1984, the Association of Village Council Presidents (AVCP), Alaska Department of Fish and Game (ADF&G), U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game, and two California sportsmen's groups tentatively agreed to a cooperative plan to reduce hunting of some species. This plan, called the Hooper Bay Agreement, called for no hunting or harvest of cackling Canadian geese and reduced hunting and harvest of white-fronted geese and black brants. Emperor geese were not included in the agreement for the reason that they do not migrate to California.

The Hooper Bay Agreement was replaced in 1985 by the Yukon-Kuskokwim Goose Management Plan. *See* Ex. A, Docket 96. In addition to continuing the hunting restrictions of the previous agreement, the plan also restricts sport and subsistence hunting of the emperor goose. Native leaders have worked closely with villages in the delta region to publicize it and encourage compliance.

Pursuant to the plan, the parties adopted monitoring, verification and enforcement procedures. Ex. B, Docket

96. Under these procedures, any suspected violations of it are to be reported to the USFWS, AVCP, and the ADF&G. These procedures further provide that the USFWS and ADF&G shall cite individual hunters for violations of the plan upon (1) a local village request; (2) recurring non-compliance or blatant violation; or (3) use of charter or private aircraft to assist in hunting. Other instances of non-compliance are responded to more informally. A cooperative team of AVCP, ADF&G and USFWS employees visits villages in response to reported violations to ensure compliance through education and information.

Initial reports indicate that the cooperative plan has been successful. *See, e.g.,* USFWS Report attached to Docket 119. There has been particularly strong support for the program from the Native community. Apparently, this had led to a major decline in the subsistence harvest of each of the species in question. The plan has also substantially reduced egg gathering activities. Of equal importance, because of the involvement of the Native community in the plan, increased enforcement, including the issuance of citations, has occurred.

Plaintiffs seek to have the court set aside the Goose Management Plan as well as what is known as the "Watson Policy" as violative of the MBTA and improperly promulgated. The "Watson Policy" refers to a policy memorandum written by the Alaska Area Director of USFWS in 1975. In this memorandum, he stated "that where there is a demonstrable need for the taking of migratory bird resources for subsistence purposes, the U.S. Fish and Wildlife Service will not recommend prosecution in Federal court for a violation of the Migratory Bird

Treaty Act during the statutory closed period." Memorandum of Gordon Watson to All Stations, Alaska Area, December 5, 1975, Plaintiffs' Exhibit A.

After plaintiffs filed this suit against the state and federal defendants, the Alaska Federation of Natives and the Association of Village Council Presidents moved for, and were granted, intervenor status. In their cross-claim, among other arguments, they allege that Congress had repealed the MBTA's prohibition on spring subsistence hunting in the Alaska Game Law of 1925, Ch. 75, 43 Stat. 739 (1925), and the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3110, 3112 (1978) (codified at 16 U.S.C. § 712 (1982). The court will address these claims first.

II. *Intervenors' Cross-Claim*

A. *The Canadian Treaty and the MBTA*

Prior to the passage of the MBTA, Congress had established a "subsistence" exception to the Alaska game laws. *See* Alaska Game Law of 1902, ch. 1037, 31 Stat. 327 (1902); Alaska Game Law of 1908, ch. 162, 35 Stat. 102 (1908). These laws allowed Natives to hunt game animals and birds at any time for food or clothing, and allowed miners and explorers to kill such game at any time when in need of food. *See* H.R. Rep. No. 951, 57th Cong., 1st Sess. 2 (1902).

The passage of the MBTA in 1918 apparently outlawed spring subsistence hunting of most migratory birds by Natives for the reason it created a closed season on migratory game birds between March 10 and September 1 of each year. The Act also left an extremely short to

non-existent fall hunting season for the Natives, as the geese leave the delta in or before September.

Intervenors initially allege that Congress did not intend the MBTA to apply to Alaska, or to repeal by implication the Alaska Game laws and their subsistence exceptions. The court disagrees, and finds that Congress intended the MBTA to apply to subsistence hunting in Alaska. First, the purpose of the MBTA was to implement the Canadian Treaty, a treaty clearly intended to include Alaska Natives within its scope. Article II, sec. 3 of the Treaty states:

> The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, quillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

Although the Treaty's framers created a subsistence exception for migratory nongame birds, they created no similar exception for migratory game birds. This demonstrates the framers' intent that no subsistence exception exist for migratory game birds, and that the Treaty apply to Alaska.

The purpose of this exception was explained in a letter from the Secretary of Agriculture to the Secretary of State, dated March 10, 1916:

> The word *other* is inserted before "migratory non-game birds" to differentiate this group from migratory insectivorous birds in Paragraph 2 and the proviso is added "*except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres, and puffins and their eggs for food and their*

> *skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.''* This proviso affects primarily the Territories of Alaska and the coastal Provinces and Territories of Canada, where the natives have been accustomed since time immemorial to utilize certain sea birds for food and clothing. The clause follows essentially certain provisions already contained in the laws of Alaska and some of the Provinces of Canada and is inserted merely to prevent any hardship on the natives in these remote parts of the continent.

Federal Memorandum in Opposition to Intervenors' Motion for Summary Judgment, Ex. A.

Other factors further evidence that the MBTA applies to Alaska. First, by its own language, the MBTA applies to both ''States'' and ''Territories.'' *See, e.g.*, MBTA § 7, 40 Stat. at 756. Second, an attempt by Mr. Sulzer, the delegate from Alaska to the House of Representatives, to amend the MBTA to create a subsistence exemption was voted down. *See* 55 Cong. Rec. 7457 (June 6, 1918) (comments of Rep. Sulzer). Last, regulations issued contemporaneous with the MBTA included Alaska within their scope. *See* Proclamation of July 31, 1918, 40 Stat. 1812; Proclamation of October 25, 1918, 40 Stat. 1863.

B. *The Alaska Game Law of 1925*

Intervenors further cmontend that the Alaska Game Law of 1925, ch. 75, 43 Stat. 739 (1925), created a ''subsistence'' exception to the MBTA. The Alaska Game Law of 1925 superseded the 1908 Game Law, and by its own terms, comprehensively regulates all hunting of game, including migratory birds, in Alaska. *See* Alaska Game Law of 1925, §§ 2, 8 and 10, 43 Stat. at 740, 743.

Section 8 of the Act prohibits all taking of game, including migratory birds, unless permitted by the Act or regulations made pursuant to it.[1] Section 10 of the Act authorizes the Secretary to issue comprehensive regulations to implement the Act, but then places certain restrictions on the scope and content of those regulations. Two of those restrictions are relevant to the issue before the court. First, the Act states that no regulation shall "prohibit any Indian or Eskimo, prospector or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available." Second, the Act requires that "nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations."[2] The court finds

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[1] Section 8, in relevant part, reads as follows:

> Sec. 8. TAKING OF ANIMALS AND BIRDS RESTRICTED.—That, *unless and except as permitted by this Act or by regulations made pursuant to this Act,* it shall be unlawful for any person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land furbearing animal, wild bird, or any parts thereof, *or any nest of egg of any such bird . . . :* Provided, that nothing in this Act shall be construed to prevent the collection or exportation of animals, birds, parts thereof, or nests or eggs of birds for scientific purposes, or of live animals, birds, or eggs of birds, for propagation or exhibition purposes, under a permit issued by the Secretary of Agriculture and under such regulations as he may prescribe. . . . (Emphasis added).

[2] The relevant language of the statute reads as follows:

> Sec. 10. *Regulations.*—That the Secretary of Agriculture, upon consultation with or recommendation of the [Alaska Game] commission, is hereby authorized and directed from time to time to determine when, to what extent, if at all, and by what means . . . game birds, nongame birds, and nests or eggs of birds may be taken, possessed, transported,

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that these two sections cannot be reconciled. The issue thus is whether the "emergency taking" clause must be read as an exception to the MBTA, i.e., the MBTA applies except for emergency taking, or whether the MBTA excludes migratory birds from an emergency taking exception.[3] To solve this problem, the court must divine the Congressional intent behind the 1925 Act. Fortunately for the court, the structure of the Act contains a number of indications of that intent.

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> caught, or sold, and to adopt suitable regulations permitting and governing the same in accordance with such determinations. . . .
>
> . . .
>
> but no such regulation . . . except as herein provided, shall prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, but the shipment or sale of any animals or birds or parts thereof so taken shall not be permitted, except that the hides of animal so taken may be sold within the Territory, but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

Alaska Game Act of 1925, § 10, 43 Stat. at 743-44.

[3] Initially, the court finds that the "emergency exception" in the 1925 Act to be a positive grant of authority to natives, prospectors, and travelers to harvest game when in need. To read it otherwise would rob the section of any meaning or effect.

First, the court finds that Congress intended the 1925 Act to comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. Section 8, for example, makes all taking of birds illegal, "except as permitted by this Act or by regulations made pursuant to this Act." The plain meaning of this language is that Congress no longer intended the MBTA to be a statutory authority for migratory bird regulations.

Section 10 of the Act further evidences Congressional intent that all future regulation of migratory birds in Alaska be pursuant to it and not to the MBTA. Section 10 gives the Secretary comprehensive authority to regulate taking of migratory birds. *See* footnote 2 *supra*. The final proviso of the section further supports this view. It states:

> nor shall any regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

If Congress had intended migratory bird regulations to be promulgated under the MBTA, it would not have been necessary for Congress to order the Secretary not to issue regulations in conflict with it. Rather, the proviso indicates that Congress expected the Secretary to issue new regulations on migratory birds under the 1925 Act and not under the MBTA.

Section 16 of the 1925 Act further demonstrates that Congress intended it to supersede the MBTA as the basis

of bird regulation.[4] Assuming that the MBTA superseded the 1908 Act, the MBTA would have been the primary source of bird regulation in Alaska at the time of the 1925 Act. If Congress had intended the MBTA to continue to be in effect in Alaska as an independent basis for regulation after the passage of the 1925 Act, it would not have repealed its applicability to Alaska in section 16. *See* discussion below.

While Congress intended all regulation of bird hunting in Alaska to be pursuant to the 1925 Act, nevertheless the terms of the MBTA were incorporated into it by reference, and any regulation under the 1925 Act was to be consistent with the MBTA. The question thus arises whether the 1925 Act repealed the MBTA as it applied to Alaska in any manner. Such a repeal could be either express or implied. 1A Singer, *Sutherland Statutory Construction* (Sands Fourth Edition 1985 Revision) § 23.07.

First, the court finds that section 16 of the 1925 Act expressly repealed the MBTA insofar as it applied to Alaska. This section voids all previous enactments relating to the protection of birds in Alaska. Given that Congress was aware of the MBTA when this section was enacted (see the section 10 proviso), the language's plain meaning is that Congress intended to include the MBTA

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> Sec. 16. *Existing Legislation Continued in Force Temporarily.*—That the provisions of existing laws relating to the protection of game and fur-bearing animals, *birds, and nests and eggs of birds* in the Territory shall remain in full force and effect until expiration of ninety days from the date of publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

Alaska Game Act of 1925 § 16, 43 Stat. at 747 (emphasis added).

within the term "existing legislation."[5] Additionally, such a result—that all previous acts are void irregardless of consistency—accords with the conclusion reached above that Congress intended the 1925 Act to be the comprehensive source of regulation for all bird hunting in Alaska. Nevertheless, since the 1925 Act incorporates the terms of the MBTA by reference, the MBTA still applied to Alaska to the extent it was not inconsistent with the other terms of the 1925 Act. However, this application was through its incorporation into the vehicle of the 1925 Act.

Second, the court finds that the 1925 Act repealed the MBTA's applicability to Alaska by implication at least so far as it is contrary to the 1925 Act's subsistence exemption. As stated by the Supreme Court,

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States,* "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; *and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.*"

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5 This clause is not a "general repealing clause." *See* 1A Singer at § 23.08; *Hess v. Reynolds,* 113 U.S. 73, 79 (1885); *Henderson's Tobacco,* 78 U.S. (11 Wall.) 652 (1870). Section 16 does not merely void prior legislation to the extent it was inconsistent. Rather, all previous enactments are voided, irregardless of consistency.

United States v. Borden Co., 308 U.S. 188, 198-96 (1939) (citations omitted). Thus, where a particular local law conflicts with an earlier general law of nationwide application, the special or local law will supersede the general enactment to the extent they are inconsistent. 1A Singer at § 23.16.

To determine whether there is an inconsistency between the 1925 Act and the MBTA, the court must first determine the relationship between the conflicting clauses in section 10 in the 1925 Act. The court finds both cannot simultaneously be given their full scope. If the penultimate emergency need[6] clause is given its plain meaning, then the word "birds" within the exception would apply to both migratory and non-migratory birds and contravene the MBTA. If, however, the MBTA clause is given precedence, then the emergency need exception only applies to non-migratory birds, not all birds as its language suggests.

A number of factors show that Congress intended the emergency need exception to take precedence. While no one of these factors is conclusive, the weight of all the factors supports the conclusion. First, the plain language of the emergency need exception compels this result. Congress shows it knew how to distinguish between different types of birds elsewhere in the 1925 Act. Its failure to do so here is evidence that it intended the exception to include all birds.

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6 As noted below, the emergency exception was expanded to a broader subsistence exception in 1940.

Second, the emergency need proviso states that "[no regulation] . . . shall prohibit any Indian or Eskimo to take . . . birds during the close season when he is in absolute need of food. . . ." This direct grant of authority under the statute allows Natives to undertake subsidence hunting, even absent implementing regulations.[7] The MBTA clause only applies to *regulations* issued pursuant to the 1925 Act. Consequently, it must be presumed that the MBTA was not meant to apply to taking for subsistence/emergency needs, which was permitted without regulation.

Third, the court places great weight on the contemporaneous interpretation given to the 1925 Act by the Department of Agriculture, the agency charged with issuing regulations. In May 1925, four months after the Act's passage, the Department issued regulations that interpreted the Act as creating an "emergency" exception to the MBTA. *See* U.S. Dept. of Agriculture, Bureau of Biological Survey, *Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory,* issued May 1925 (Federal Defendants' exhibit "E", Intervenor's Exhibit "J"). Regulations 12 and 13 created seasons and set bag limits for migratory birds. Regulation 8, however, provided an absolute exception to those limits, providing:

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7 This position is further supported by the subsection of the emergency need proviso that allows the Secretary "by regulation" to limit such taking in event of species decline. The implication is that, absent such regulation, emergency need taking is allowed.

REGULATION 8.—TAKING OF GAME BY PROSPECTORS, TRAVELERS, AND CERTAIN INDIANS WHEN IN NEED OF FOOD

An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

This interpretation prevailed for 19 years, until 1944 (*See* below.)

Fourth, the court relies on the principles of statutory interpretation that ambiguities in statutes intended to benefit Natives must be resolved in favor of the Natives, and that the emergency clause, being the more specific, locally-oriented clause, is presumed to control over the MBTA, the more general statute. *See, e.g., Morton v. Mancari,* 417 U.S. 540, 550-51 (1974). Last, reading the "emergency" exemption as controlling is logical as well. It would be reasonable to assume that, given an "absolute" need for food, Congress would intend that all type of game be available for taking to avoid starvation.

Based on the above factors, the court finds that Congress intended the "emergency need" provision to create an exception to the MBTA rather than the other way around. Consequently, the 1925 Act, at least to the extent of that provision, is repugnant to the MBTA and impliedly repeals the MBTA to the extent of that inconsistency.

C. *The 1940 "Subsistence" Amendment and the 1943 Game Act*

In 1940, Congress expanded the "emergency" provision in the 1925 Act to create a broader subsistence exception. The 1925 Act had created a narrow subsistence exception, under which a Native could take game and birds out of season "when in absolute need of food and other food is not available." Federal agencies apparently interpreted this standard narrowly to prosecute Natives for hunting game out of season.[8] In order to reconfirm that the "need" exception was intended to apply to subsistence hunting, Congress amended section 10 of the 1925 Act to allow Natives to take birds and animals out of season "when . . . in need of food and other sufficient food is not available." Act of October 10, 1940, ch. 845, 54 Stat. 1103-04; H. Rep. No. 2746, 76th Cong. 3d Sess. (1940). Thus, to the extent that the 1925 Game Act survived statehood, it survived in this broader form.[9]

D. *The 1944 Regulation*

In 1944, the USFWS amended the subsistence regulation to exclude migratory birds from its scope. As rewritten, the regulation read:

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[8] The major area of dispute was deer hunting in southeast Alaska.

[9] The 1925 Act was reenacted, with amendments not relevant here, in 1943. Act of July 1, 1943, ch. 183, 57 Stat. 301. This reenactment is important in one sense, however. At the time of reenactment, Congress had before it the long-standing regulation allowing subsistence hunting of migratory birds. Congress' failure to clarify the statute's language demonstrates its acceptance of that regulatory interpretation and must be seen as a ratification of the regulation.

> An Indian or Eskimo, or an explorer, prospector, or traveler, may take animals, birds (*except migratory birds*), or game fishes in any part of the territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish, or part thereof so taken; and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing, for his own use and that of his immediate family.

9 Fed. Reg. 5270 (May 15, 1944) (emphasis added). When an administrative agency changes its interpretation of a statute after a long period of time, the court must give far more credence to the original interpretation than the later reinterpretation. *See Watt v. Alaska,* 451 U.S. 259, 272-73 (1981). The court finds that the reinterpretation here was contrary to law, and the prior interpretation correct. Accordingly, it is the 1925 Act and not the 1944 regulation that controls.

E. *Alaska Statehood Act*

The federal defendants argue that even if the 1925 Act repealed the MBTA by implication the 1925 Act was in turn "superseded" or "rendered obsolete" by the Alaska Statehood Act, thus reviving the MBTA. *See* Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act states:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska Game Law of July 1, 1943, [the 1925 Alaska Game Law, as amended], and

> under the provisions of the Alaska commercial fisheries laws of June 26, 1906 [citation omitted] and June 6, 1924 [citation omitted] as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; *Provided,* that the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State legislatures has made adequate provision for the administration, management, and conservation of said resources in the broad national interest * * *.

Federal defendants admit there was never an express repeal of the 1925 Act. *See generally* Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141 (1959) (act repealing laws made obsolete by Statehood Act). However, if a statute was not expressly repealed, any repeal (at least under the facts of this case) must have occurred through repeal by implication.

1. *Express Repeal*

Although not mentioned by the parties, there in fact was an express repeal of the 1925 Act. *See* Fish and Game Code of Alaska, Ch. 94, 1959 Session Laws of Alaska, Art. IV, § 1. For the reasons stated below, this repeal did not affect that portion of the 1925 Act that regulated migratory birds.

This repeal by the Alaska State Legislature presumably was under the authority granted it by section 8(d) of the Alaska Statehood Act. This section allowed the state to modify or repeal Territorial laws, that is "all

laws or parts thereof enacted by the Congress the validity of which is dependent *solely* upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the union." *See generally Metlakatla Indian Community v. Egan,* 362 P.2d 901, 922 (Alaska 1961), *vacated on other grounds,* 369 U.S. 45 (1962) (discussing effect of § 8(d)).

This statute did not effectively repeal the 1925 Act's subsistence exception to the MBTA for two reasons. First, that portion of the 1925 Act that regulated migratory birds was not a law "the validity of which is dependent *solely* upon the authority of Congress to provide for the government of Alaska. . . ." Rather, that regulation's validity was equally based on the authority of Congress to implement treaties. *See Missouri v. Holland,* 252 U.S. 416 (1920). The fact that Congress incorporated the terms of the MBTA, which was based on Congress' treaty power, into the 1925 Act by reference clearly demonstrates Congress' intent to rely on its authority. Additionally, Congress in the 1925 Act chose, for humanitarian reasons, not to enforce the 1916 Canadian treaty against Natives in need of food. Although this exception was contrary to the terms of the treaty, Congress nevertheless was acting under its authority to implement the treaty when it decided to implement it only partially.

Second, even after statehood, the authority to manage migratory birds remained an area of federal regulation, and such authority was not passed to Alaska. *See* Federal opposition brief, Docket 70, at 38. The reason for this appears in a letter written by the Department of the Interior that appears in a Senate Report on Alaska statehood:

> [The Statehood Act] would transfer to the State of Alaska the same jurisdiction and control over the fisheries and wildlife therein as are possessed and exercised by the existing States within their territorial limits and adjacent waters. Authority over matters affecting migratory birds would not be transferred, since this is a subject which is governed by Federal law throughout the Union. . . . [This situation] involve[s] the discharge of international commitments, undertaken by the United States through treaty or convention.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Accordingly, given that regulation of taking of migratory birds is an area of federal primacy, the Statehood Act's § 8(d) did not give the state the authority to repeal federal policy in the area.

2. *Repeal by Implication*

The Statehood Act also did not impliedly repeal the 1925 Act's regulation of migratory birds. As noted above, in order for there to be repeal by implication, there must be actual inconsistency or repugnance between statutes. If implied repeal is to be present here, such inconsistency must be found in section 6(e) of the Statehood Act, which transferred the administration and management of fish and wildlife resources to Alaska. However, authority over regulation of migratory bird takes was not transferred to Alaska (*see* above). It therefore cannot be shown that there was the transfer of any authority to the state that would be inconsistent with continued federal management of migratory birds under the 1925 Act.

F. *The Fish and Wildlife Improvement Act of 1978*

The court declines to address whether the Secretary has authority to issue regulations pursuant to the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3112 (1978) (codified at 16 U.S.C. § 712(1) (1982)). There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision.

G. *Conclusion*

In conclusion, the court finds that the MBTA's direct regulation of migratory birds in Alaska was repealed by the 1925 Act. However, since the 1925 Act incorporates the terms of the MBTA by reference, the net result is that the MBTA's terms, except for subsistence situations, continue to apply. Such regulation is pursuant to authority granted the Secretary by the 1925 Act. The court further finds that the Statehood Act did not transfer authority over migratory birds to Alaska, and that therefore the 1925 Act's provisions on migratory birds continue in effect. In the absence of regulation to the contrary, subsistence hunting of migratory birds for nutritional (as opposed to cultural or other) needs remains legal.

III. *Plaintiffs' Claims*

A. *The Hooper Bay Agreement*

Plaintiffs allege that the Hooper Bay Agreement was adopted in violation of a number of statutes and that its adoption was arbitrary and capricious. Because the Hooper Bay Agreement has been superseded by the 1985 Yukon-

Kuskokwim Delta Goose Management Plan, these claims must be dismissed as moot.

B. *The Watson Non-Enforcement Policy*

The Watson policy of December 5, 1975, purported to define circumstances in which the U.S. Fish and Wildlife Service would forebear to enforce the MBTA against subsistence users. Plaintiffs challenge this declaration of policy on a variety of procedural and substantive grounds. Because this court holds that the MBTA does not apply to the subsistence takings addressed by the policy, the forebearance promised by the Watson Non-Enforcement Policy is irrelevant. To invalidate the policy would not affect enforcement—there can be none—or remedy the injuries of which plaintiffs complain. Accordingly, the claims relating to the validity of this policy are moot.[10]

C. *The 1985 Yukon-Kuskokwim Delta Goose Management Plan*

1. *APA*

Plaintiffs apparently contend that the current Goose Management Plan (GMP) constitutes a regulation adopted without compliance with the Administrative Procedure Act. Portions of the GMP are not self executing; the proposed restrictions on sport hunting, for example, were not intended to become effective without separate promul-

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10 Alternatively, the lack of redressability of plaintiffs' alleged injury may be viewed as vitiating standing. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976). What is clear is that no case or controversy exists with respect to the Watson policy.

gation of appropriate regulations. Plaintiffs, however, challenge the agreement only insofar as it allegedly restricts agency discretion with respect to enforcement of the MBTA against subsistence users and delegates enforcement responsibility to the Association of Village Council Presidents (AVCP).

This claim is mooted by this court's holding regarding the reach of the MBTA. In essence, the subsistence-enforcement aspect of the GMP has become a mere statement of intent by the AVCP to enforce the plan voluntarily. The Fish and Wildlife Service cannot enforce the MBTA against bona fide subsistence users in the Delta, and its promises to refrain from doing so under certain conditions are irrelevant. Thus, the GMP is no longer a "promise" to withhold enforcement of the MBTA.

2. *NEPA*

For the same reason, plaintiffs' National Environmental Policy Act (NEPA) claim regarding the GMP is also moot. Given the irrelevance of the federal promises not to enforce, the subsistence aspect of the GMP is not the major federal action required to trigger NEPA. 43 U.S.C. § 4332(c). Moreover, it would be futile to order an EIS for a government declaration regarding application and enforcement of an act it has no power to enforce.

It is conceivable that the GMP as a whole could trigger the EIS requirement, even though much of it is not self-executing and subsequent implementing regulations might be promulgated only after issuance of their own EIS's. When the moot MBTA-enforcement aspect of the plan is removed, what remains is a plan in which state

and federal governmental parties propose interrelated actions to reduce sport hunting take, and which the AVCP states on behalf of its constituents a plan to reduce subsistence take on a voluntary basis. Even if NEPA applies to the GMP as a whole, however, it must be remembered that plaintiffs' alleged injury grows solely out of subsistence hunting and egging. The Fish and Wildlife Service's acceptance of voluntary concessions regarding that legal take has caused plaintiffs no injury in fact; in other words, the alleged injury from subsistence take is not "fairly traceable" to the action occurring here, i.e., voluntary reduction in subsistence take. *Cf. Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977). Moreover, invalidation of the GMP would not redress plaintiffs' injury. *See Simon, supra.* Plaintiffs are therefore without standing to raise NEPA issues growing out of the GMP.[11]

3. *Yukon Delta National Wildlife Refuge/ ANILCA Claims*

Section 303(7)(B) of the Alaska National Interest Land Conservation Act (ANILCA) sets forth the purposes for which the Yukon Delta National Wildlife Refuge shall be managed. 94 Stat. 2392. Sub-parts (ii) and (iii) of the above section create the following purposes for the refuge:

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[11] Even if plaintiffs had standing to raise the NEPA issues and prevailed on those issues, it is likely that the "exceptional circumstances" doctrine would preclude issuance of an injunction pending completion of the EIS. *See American Motorcyclist Ass'n v. Watt*, 714 F.2d 963, 966-97 (9th Cir. 1983).

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local rural residents;

There is no evidence that Congress intended to prevent any taking of migratory birds in the refuge. Such an intent would conflict with Congressional intent in passing section 3(h)(2) of the FWIA. *See* 16 U.S.C. § 712(1) and associated legislative history. In any event, the Canadian government has agreed to amend the 1916 treaty to allow some subsistence hunting of migratory birds. Thus, allowing subsistence hunting does not conflict with the purpose of any treaty obligation. On the other hand, if this section is read as prohibiting all subsistence hunting of migratory birds, section (iii) becomes devoid of meaning, as practically all birds within the refuge are migratory and thus would not be subject to subsistence take.

IV. *State's Motion to Dismiss Counts IV and VII and Part of Count I*

Plaintiffs have not opposed the state's motion to dismiss their state law claims. The motion is deemed well taken and granted. Local Rule 5(B)(4).

Accordingly, IT IS ORDERED:

(1) THAT the intervenors' cross-motion for summary judgment on their cross claims is granted in part and denied in part as set forth above.

(2) THAT the state's motion to dismiss Counts IV, VII and part of Count I of plaintiff's complaint is granted;

(3) THAT the various parties' motions to dismiss/grant summary judgment on plaintiffs' claims are granted;

(4) THAT plaintiffs' motion for partial summary judgment is denied;

(5) THAT plaintiffs' motion to vacate stay is denied as moot;

(6) THAT the federal defendants' cross-motion for summary judgment against intervenors is denied in part and granted in part, as set forth above.

DATED at Anchorage, Alaska, this 24th day of January, 1986.

/s/ James A. von der Heydt
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC. and ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC., Plaintiffs, vs. ROBERT JANTZEN, Director, United States Fish and Wildlife Service, and DON COLLINSWORTH, Commissioner, Alaska Department of Fish and Game, Defendants. and THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and STATE REPRESENTATIVE TONY VASKA, Intervenors/Defendants.	FINAL JUDGMENT

J84-013 CIV

IT IS ORDERED AND ADJUDGED:

(1) THAT judgment is granted intervenors on paragraph (c) of their prayer for relief in their cross-claim.

The court holds that until such time as the Secretary of the Interior adopts regulations pursuant to section 3(h)(2) of the Fish and Wildlife Improvement Act, the Congress has authorized Alaska Natives to harvest migratory waterfowl under the Alaska Game Act of 1925 (as amended) during any season of the year, including but not limited to the spring and summer months, when they or members of their family are in need of food and other sufficient food is not available.

Intervenors claim in paragraph (a) and (b) of their cross-claim are dismissed as unripe.

(2) THAT all plaintiffs' claims are dismissed.

DATED at Anchorage, Alaska, this 24th day of January, 1986.

/s/ James A. von der Heydt
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA FISH & WILDLIFE FEDERATION & OUTDOOR COUNCIL, INC., a non-profit Alaska corporation, and ALASKA FISH & WILDLIFE CONSERVATION FUND, INC., a non-profit Alaska corporation, Plaintiffs, vs. ROBERT JANTZEN, Director of the U.S. Fish & Wildlife Service, and DONALD COLLINSWORTH, Commissioner of the Alaska Department of Fish & Game, Defendants, and ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and State Representative TONY VASKA, Intervenors.	SUPPLEMENTAL MEMORANDUM AND ORDER

J84-013 CIV

THIS COURT issued an order denying plaintiffs' motions for a temporary restraining order and preliminary

ction May 25, 1984. The court now sets forth sup-ental findings of fact and conclusions of law pursuant d. R. Civ. P. 52(a).

indings of Fact.

1) The Yukon-Kuskokwim Delta is the summer ng ground for many species of waterfowl, including ackling Canadian goose, the Pacific white-fronted , the Pacific black brant, and the emperor goose.

2) The populations of the four species listed above experienced a marked decline, caused in part by sting of thoses pecies by Natives living in the Delta n.

3) Such harvesting by Natives is potentially illegal the United States—Great Britain Convention for rotection of Migratory Birds, August 16, 1916, 39 1702, T.S. 628, and the Migratory Bird Treaty Act, S.C. §§ 703-11 (1982). (This is an issue in this case.) law enforcement officials have assumed that Native stence harvest are illegal under these laws, virtually fort has been made to enforce compliance.

4) In January, 1984, the Association of Village il Presidents (AVCP), Alaska Department of Fish ame, U.S. Fish and Wildlife Service, the California rtment of Fish and Game, and two California sports- groups agreed to a cooperative plan to reduce ng of some species. This plan, called the Hooper Agreement, calls for no hunting or harvesting of ng Canadian geese and reduced hunting and harvest ite-fronted geese and black brants. Emperor geese

ded in the agreement for the reason that grate to California.

tiffs seek to invalidate the Hooper Bay illegal and to enforce the total hunting ring and summer contained in the Migra- ty Act.

e is a public interest in both protecting the estyle of the Natives and protecting the the bird species listed above.

Hooper Bay Agreement represents the first effort to stop the decline of the species Hooper Bay Agreement. Kelso aff. ¶ 12.

Hooper Bay Agreement, if enforced, is like- e populations of cackling Canadian geese, nd white-fronted geese recover. Timm aff.

itional methods of enforcing game laws have tive in protecting these species for political cal reasons. *See* Wolfe aff. ¶ 3; Kelso aff. aff. ¶ 7. The cooperative approach em- Hooper Bay Agreement is likely the best forcing hunting restrictions of wildfowl in ive compliance. Kelso aff. ¶¶ 3, 7-11; Riffe Wolfe aff. ¶¶ 16, 19.

quiring agencies to enforce game laws in a nner or voiding the Hooper Bay Agreement to improved protection for the species cov- greement, and in fact may cause increased t of those species. Jones aff. ¶ 10; Williams

is a public interest in fostering coopera-
ves, different government agencies, and
ervation groups regarding management
aff. ¶¶ 22-24.

ing the implementation of the Hooper
t this time will harm the spirit of co-
st existing between the Natives, govern-
nd sports hunting groups. Jones aff.

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sufficient to create any danger of popu-
ent to endanger the species. Riffe aff.
8.

f Law

ndard for issuing injunctive relief and
sions of law are set forth in this court's

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holds that no injunction should issue on
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and in fact may further jeopardize them.
otorcyclist Ass'n v. Watt, 714 F.2d 962,
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Filings

all return the docket sheet and case file
neau. All parties shall file future mo-
gs in Juneau until further order.

DATED
1984.

p. 65

Alaska, this 4th day of June,

mes A. von der Heydt
nited States District Judge

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such birds, unless the context otherwise requires.
ever the taking of animals, birds, or nests or eggs
or game fishes is permitted, reference is had to t
lawful means and in lawful manner.

* * *

Game birds: Anatidae, commonly known as w
including ducks, geese, brant, and swans; Haemato
Charadriidae, Scolopacidae, and Phalaropodidae,
ly known as shorebirds, including oyster-catcher
sandpipers, snipe, curlew, and phalaropes; Gruid
monly known as crane; and the several species o
and ptarmigan, and such other birds as have bee
hereafter be transplanted, introduced, or reintrod
the Territory, or any part thereof, and found and
by the Secretary to be game birds.

MIGRATORY BIRD TREATY ACT

16 U.S.C. §§ 703-711

§ 703. Taking, killing, or possessing migratory
lawful

Unless and except as permitted by regulati
as hereinafter provided in this subchapter, it sh
lawful at any time, by any means or in any m
pursue, hunt, take, capture, kill, attempt to take
or kill, possess, offer for sale, sell, offer to barte
offer to purchase, purchase, deliver for shipment
port, import, cause to be shipped, exported or

determinations, which regulations shall become effective when approved by the President.

FISH AND WILDLIFE IMPROVEMENT ACT

16 U.S.C. § 712

§ 712. Treaty and convention implementing regulations, seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

(1) In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

(2)

FILED

FEB 12 1988

JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1157

In The

ourt of the United States

October Term, 1987

A FEDERATION OF NATIVES,
OF VILLAGE COUNCIL PRESIDENTS,
nd TONY VASKA,

Petitioners,

vs.

AND WILDLIFE FEDERATION AND
CIL, INC., THE ALASKA FISH AND
ERVATION FUND, INC., FRANK L.
United States Fish and Wildlife Service,
COLLINSWORTH, Commissioner,
epartment of Fish and Game,

Respondents.

N FOR WRIT OF CERTIORARI TO
D STATES COURT OF APPEALS
R THE NINTH CIRCUIT

EF IN OPPOSITION

SH AND WILDLIFE FEDERATION
DOOR COUNCIL, INC., AND
H AND WILDLIFE CONSERVATION
FUND, INC.

OGAN, & HOLMES

he Alaska Fish and Wildlife Federation
l Wildlife Conservation Fund
SEL:
Gregory F. Cook
P.O. Box 618
Douglas, Alaska 99824
(907) 586-9719

714 S. Franklin, Suite Juneau, Alaska 99801 (907)586-1099

NTS

TREATIES:

MISCELLANEOUS:

Respondents, the Alaska Fish and Wildlife Conservation Fund and the Alaska Fish and Wildlife Federation and Outdoor Council (hereinafter referred to jointly as "the Conservation Fund"), respectfully request that this Court DENY the petition for a writ of certiorari which seeks review of the Ninth Circuit Court of Appeals' ruling in this case. The opinion of the Ninth Circuit is reported at 829 F. 2d 933 (9th Cir. 1987).

STATEMENT OF THE CASE

Hunting of migratory geese and the taking of eggs from nests during the spring nesting and rearing season in western Alaska is a significant factor contributing to the long term decline of four species of migratory waterfowl: Cackling Canada geese, White-fronted geese, Pacific black brant, and Emperor geese.[1]

The periods of mating, nesting, brood-rearing, and molting, when birds are reproducing or recovering from the stress of reproducing, are the times when hunting has the

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[1]SEE GENERALLY; D. Raveling, "Geese and Hunters of Alaska's Yukon Delta: Management Problems and Political Dilemmas," Transactions of the 49th North American Wildlife and Natural Resources Conference, Wildlife Management Institute, Washington, D.C., (1984).

The population declines for these four types of arctic nesting geese were so severe at the time this suit was filed that a computer regression analysis of the long-term population trend projected termination of the colonial nesting geese of the Yukon-Kuskokwim Delta in 1994. USFWS, Pacific Flyway Report, pp. 5-6 (November, 1983).

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Article II
Migratory
Stat. 1702,

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[2]Human
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[3]"Here a
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435 (1920).

ıe Conservation Fund brought this action against 'S and the state defendant in United States District Court g to enjoin the two government agencies from granting sion to kill geese during the closed season.

titioners intervened and filed a cross-claim against the l and state defendants, seeking to have spring and er hunting of nesting geese by Alaska Natives declared

n cross-motions for summary judgment, the District ruled that the 1925 Alaska Game Law ("1925 AGL") ed the 1918 Migratory Bird Treaty Act ("MBTA") r as MBTA had applied to Alaska. Thus, the court ed, USFWS was without authority to restrict waterfowl g by Alaska Natives.

n appeal by the Conservation Fund to the Ninth Circuit of Appeals, that court unanimously REVERSED the ct Court, holding that the Migratory Bird Treaty Act ns the hunting of migratory birds in Alaska and the A does not permit closed season hunting of migratory 829 F. 2d at 935.

etitioners now seek review of the ruling by the Ninth t Court of Appeals. The Conservation Fund OPPOSES tition.

REASONS WHY THE PE

1. The Court of Appe
Alaska Game Law
Federal Question;
the Migratory Bi
Repealed Confirms
of the Administrati
on Hunting Nestin
Principles of Wildli

A. The narrow, subst
instant petition is whether th
Pub. L. 65-186, 40 Stat. 75
1916 U.S.-Canada Conventi
Birds, was repealed by the
68-320, 43 Stat. 739 (1
migratory birds in Alaska.

Only if the answer to th
petition raise another narro
10 of the 1925 AGL surviv
Statehood Act, Pub. L. 85-
repealed earlier enactme
government.

The unanimous ruling
answered both questions in t

B. Review by the S
Appeals' decision in this ca
1925 Alaska Game Law, pr
the public and the courts ev
no way "an important federa
review.

Court of Appeals that the 1918
as not repealed by the 1925 AGL
ourt of Appeals' ruling confirmed
f the federal agencies vested by
manage and protect migratory
ose agencies have consistently
ory waterfowl by all persons,
s prohibited by the 1916 U.S.-
nplementing legislation, the 1918
5.

MBTA has applied throughout the
etitioners argued below that the
o the Territory of Alaska, both
oners' argument and held to the

t in that argument here. Instead,
TA was partially repealed by
exempting Alaska Natives from

question for review, petitioners
cape the burdens of the word
lly using that word. Instead,
sks whether subsequent to 1925,
taking of migratory waterfowl in
e phrasing may be cosmetically
e considerable burden of proving
the MBTA. It is a burden the

The Court of Appeals flatly held that hunting during the d season in Alaska is prohibited by the 1918 MBTA. As cated by the Circuit Court of Appeals, the 1925 AGL er explicitly nor implicitly repealed MBTA in Alaska. 829 d 942-945. This ruling by the Court of Appeals was pletely correct.

Article II of the 1916 U.S.-Canada Convention blishes a closed season on migratory waterfowl between ch 10 and September 1, annually. The MBTA adopts and ements the closed season provisions of that treaty. 16 C. 704.

No legitimate analysis of the 1925 AGL supports a partial al of the closed season rule of the MBTA. Nothing in the slative history of the 1925 AGL indicates that Congress nded in 1925 to repeal any part of the Migratory Bird ty Act. In its day, the MBTA was, in a legal sense, olutionary. It is inconceivable that Congress would ally repeal MBTA by implication in 1925 without a tilla of legislative history to that effect. Yet this is isely the argument petitioners entreat this Court to rtain.

Since 1918, and as recently as 1978, Congress has eatedly reaffirmed the closed season rule of the MBTA.[4] gress has steadfastly affirmed that waterfowl hunting may

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[4]A proposed Protocol Amendment to the 1916 U.S.-Canada vention was indefinitely deferred by the U.S. Senate due to "the near imous opposition of conservation groups in the United States and ada." SEE: Letter from Don Collinsworth, defendant herein, to U.S. artment of Interior, October 12, 1981.

occur during the times outside the closed season sions of the 1916 treaty. 829 F. 2d 940-942. It is ous for petitioners to argue that Congress intended the AGL, rather than the 1918 MBTA, to control the taking gratory waterfowl in Alaska. (Petition, p. 20.)

etitioners' central contention is that the prohibitions of BTA were repealed by Congress, silently and implicitly, denced by two portions of the 1925 AGL: a) Section 8 1925 AGL, 43 Stat. 743, which made it unlawful for rson to take "any game animal, land fur-bearing animal ild bird" in Alaska except as permitted by the Secretary riculture; and b) Section 10 of the 1925 AGL, which ized the Secretary to adopt regulations determining when w game animals, land fur-bearing animals, game birds game birds may be taken. (Petition at pp. 19-20.)

s petitioners intimate, a potential for overlap existed en the MBTA and the 1925 AGL in respect of migratory owl in Alaska. However, the two laws are easily read niously. Congress eliminated the latent ambiguity in the AGL by specifically stating its intent that the MBTA the controlling legal authority. Section 10 of the 1925 tates: "...nor shall any such regulation contravene any provisions of the migratory bird treaty Act and tions." 43 Stat. 744.

ne Court of Appeals analyzed the provisions of the 1925 and found no conflict with the MBTA. The Court of ls gave effect to the plain language of Section 10 that the ions of the MBTA may not be contravened. 829 F. 2d -943. The analysis by the Court was careful and stive, and it is manifestly correct. Its holding is rted by the cardinal rule of statutory construction that

on are not favored, Watt v Alaska, 451
d will not be found unless the intent to
nequivocal. Rodriguez v United States,
'), 94 L. Ed. 2d 533.

licy against repeal by implication is of
en, as here, the purported repeal would
protections for wildlife established under
EE: Andrus v Allard, 444 U.S. 51, 62, n.
will not be deemed abrogated or modified
less the intent of Congress to do so has
ed. Cook v United States, 282 U.S. 102
sely the contrary appears. Congress has
ted that MBTA has always been the
r migratory birds in Alaska.[5]

do not develop their second question, viz.,
rovisions of the 1925 AGL survived
958 Alaska Statehood Act. The Court is
ent edition of 48 USCA 191-213, which
in view of the admission of Alaska into

sertion That the Court of Appeals Was
sdiction to Determine the Secretary's
r the 1978 Amendment to the MBTA Is
an Assertion That the Ruling Was *Obiter*

C 3125, the 1980 Alaska National Interest Lands
815 (4): "Nothing in this title shall be construed
ng...the Migratory Bird Treaty Act." SEE ALSO:
he 1978 amendment to the MBTA, S. Rep. No.
Sess., reprinted in the 1978 U.S. Code Cong. &
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rs assert that the Court of Appeals opinion when it construed the authority Interior to adopt regulations permitting erfowl during the closed season. This reversal by petitioners, for it was their the District Court which sought a ly the point which petitioners now say ssible advisory opinion. One speculates ave taken a more hospitable view if the g had been favorable.[6]

se the concepts of jurisdiction and er courts possessed subject matter case. Indeed, the determination by the he Conservation Fund has standing has petitioners.

on that the Court of Appeals should not cretary of Interior's authority under the the MBTA is nothing more than an ion of the Court of Appeals is *dictum*. hat petitioners are correct, they are not g that point in other forums. But it is ted States Supreme Court to stand as a ces of *dicta* by lower courts.

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the facts to this Court by stating that the 16 USC 712 was not briefed or argued to the tion at p. 21.) The contrary is true. The ed and argued orally that the 1978 MBTA ng to the closed season provisions of the 1916 SEE: Brief for Plaintiffs-Appellants, p. 34, and Reply Brief for Plaintiffs-Appellants, pp.

of Appeals on the
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ust be in accord with
uch time as the 1916
F. 2d at 940-942.

The ruling of the Cou
dictum, and it is correct.

In short, the 1916 U
Protection of Migratory Bir
the hunting season from M
in order to protect nesting w
closure has never been re
Congress has periodically r
alter the closed season.
opinion in the seminal case
416, 435 (1920) is just as v
decades ago: without the pr
soon be no migratory birds

CON

For these reasons, the
should be DENIED.

DATE: February 9, 1988

Respectful

William B
FAULKNE
Attorney o
Wildlife C
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3 MBTA each close
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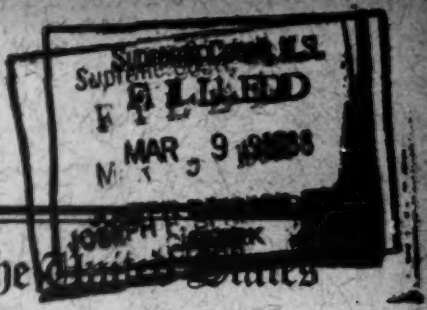

No. 87-1157

e Court of the United States

CTOBER TERM, 1987

ON OF NATIVES, ET AL., PETITIONERS

v.

KA FISH AND WILDLIFE
D OUTDOOR COUNCIL, INC., ET AL.

OR A WRIT OF CERTIORARI TO THE
STATES COURT OF APPEALS
R THE NINTH CIRCUIT

DERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Acting Assistant Attorney General
EDWARD J. SHAWAKER
J. CAROL WILLIAMS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ENTED

of 1925, ch. 75, 43 Stat.
Migratory Bird Treaty
lated statutes that limit
ory game birds.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1157

ALASKA FEDERATION OF NATIVES, ET AL., PETITIONERS

v.

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 829 F.2d 933. The memorandum opinion of the district court (Pet. App. 33-58) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1987. The petition for a writ of certiorari was filed on January 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1916, the United States and Great Britain, acting on behalf of Canada, signed a convention in which they agreed to protect migratory birds from "indiscriminate slaughter" and to insure their preservation.

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convention to allow hunting, taking, * * * or export of any [migratory] bird * * *" (16 U.S.C. 704).[1]

Following the MBTA's enactment, the Secretary of Agriculture adopted regulations specifying "when, to what extent, * * * and by what means" migratory birds could be hunted. Proclamation of July 31, 1918, 40 Stat. 1812.[2] These regulations create a limited waterfowl hunting season for the State of Alaska and establish bag limits on the number of waterfowl a person can take in one day.[3] They make an exception, however, for the taking of certain migratory nongame (but not game) birds by Native Alaskans.[4] The regulations have been periodically revised

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[1] In addition to the Canadian convention, the MBTA and related statutes implement hunting conventions with Mexico, Japan, and the Soviet Union. See 16 U.S.C. 703 *et seq.*; 16 U.S.C. 712, 715j. The four treaties differ considerably with respect to the issue in this case—*i.e.*, with respect to subsistence hunting by Native Alaskans.

[2] Section 3 of the MBTA provided that implementing regulations would become effective when approved by the President. See 16 U.S.C. 704. Thus, from 1918 until 1950, MBTA regulations were issued by Presidential proclamation. In 1951, however, the President empowered the Secretary of the Interior to promulgate regulations without prior approval, ratification, or other action of the President. See Exec. Order No. 10,250, 3 C.F.R. 755 (1949-1953 Comp.).

[3] Regulation 4 (40 Stat. 1814) provides, in pertinent part:

> The open seasons for waterfowls (except wood ducks, eider ducks, and swans) coot, gallinules, and Wilson snipe or jacksnipe shall be as follows:
>
> * * * * *
>
> In Alaska the open season shall be from September 1 to December 15.

[4] Regulation 7 (40 Stat. 1816) provides:

> In Alaska Eskimos and Indians may take for the use of themselves and their immediate families, in any manner and at any time, and possess and transport auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing.

over the years, but th
closed season establis
game birds in Alaska.
1921, 42 Stat. 2240;
Stat. 2265; Proclama
1915-1916; Proclama
1961-1962; Proclamat
2579-2580.

2. In January 19
Game Law (AGL), ch
ed.) 192 *et seq.* (repea
unlawful for any pers
offer to sell, purchas
animal, land fur-beari
thereof, or any nest o
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[5] This provision was am
845, 54 Stat. 1103-1104, t
animals out-of-season "wh
cient food is not available

nd regulations" (43 Stat. 744). Section
ted "[t]hat the provisions of existing
rotection of * * * birds, and nests and
ska] shall remain in full force and ef-
on of ninety days from the date of the
tions of the Secretary of Agriculture
the provisions of this Act" (43 Stat.

ons adopted to implement the AGL
laska game law (act of January 13,
gulations thereunder supersede all
s and regulations for the protection of
fur-bearing animals, and birds in the
[M]igratory [B]ird [T]reaty [A]ct of
tat. 755), * * * and the regulations
a Game Law and Regulations and
ng to Game and Birds In The Territory
ft. Exh. E)). These regulations further
ndian, Eskimo, or half-breed who has
al relations by adopting a civilized
y exercising the right of franchise, and
ctor, or traveler may take animals or
f the Territory at any time for food
eed of food and other food is not
ll not ship or sell any animal, or bird,
taken" (*id.* Reg. 8). Nineteen years
n was amended to exclude migratory
g. 5270, 5271 (1944). As amended, the
d in effect until 1960, when all regula-
the AGL were deleted from the Code
ions as having been "superseded by
aska Statehood Act (Act of July 1958;
nended" (25 Fed. Reg. 7681 (1960)).
d Wildlife Service (FWS) is charged
ity for administering and enforcing the

A (Pet. App. 7). In this regard, the FWS has long
the position that the MBTA prohibits the harvesting
gratory birds between March 10 and September 1 of
year (*ibid.*). The FWS has also recognized, however,
subsistence hunters in Alaska have great needs for
meat in the spring and summer months and that
cal and geographic considerations render traditional
nforcement methods ineffective in the vast reaches of
Alaska (*ibid.*). Accordingly, in recent years, it has
xpended its limited resources on efforts to ensure
liance with the MBTA in Alaska (*ibid.*).

e FWS has, however, taken steps to reduce the take
clining migratory bird species (Pet. App. 8). Thus, in
ry 1984, the FWS entered into an agreement—called
ooper Bay Agreement—with the Alaska Department
h and Game (ADF&G), the California Department
sh and Game (CDF&G), and the Association of
e Council Presidents of Alaskan Natives to limit the
ng of four species of migratory game birds—the
ng Canada geese, brant, white-fronts, and emperor
—during the 1984 season (*ibid.*). While not pro-
ng all takings of such species, the agreement placed a
torium on all harvesting of cackling Canada geese;
bited all egg gathering for cackling Canada geese,
, and white-fronts; imposed a fifty-percent reduction
e open season sport-hunting harvest of brant and
-fronts; and barred closed season subsistence hunting
ese two species during nesting, rearing, and molting
ds (*ibid.*; see also Excerpt of Record (ER) Tab 24).
renewed and refined these agreements in 1985 and in
succeeding season (Pet. App. 8).

ore the 1984 nesting season began, however, two
rofit Alaskan corporations, the Alaska Fish and
ife Conservation Fund, Inc. (the Fund), and the
a Fish and Wildlife Federation and Outdoor Coun-

Inc. (the Council), filed suit in district court against the ector of the FWS and the Commissioner of the F&G (Pet. App. 8-9). They sought to have the district rt enjoin the FWS from acquiescing in the taking of migratory birds by Native Alaskans, for subsistence poses or otherwise, and to declare that the FWS must ply with the Administrative Procedure Act (APA), 5 .C. 701 *et seq.*, and the National Environmental cy Act (NEPA), 42 U.S.C. 4321 *et seq.*, before enter- into any agreements in which takings of migratory s are allowed (Pet. App. 8-9). Shortly thereafter, the ska Federation of Natives, the Association of Village ncil Presidents, and Alaska State Representative Tony ka intervened and cross-claimed against the FWS; they ght to have the district court declare that the AGL ner than the MBTA) governs subsistence hunting of ratory game birds in Alaska and that, until the etary of the Interior adopts regulations pursuant to Fish and Wildlife Improvement Act of 1978 (FWIA), . L. No. 95-616, 92 Stat. 3110, which supplements the utory protections for migratory birds, Alaskan Natives engage in subsistence harvesting of migratory birds . App. 9).

he district court granted summary judgment to the in- enors and dismissed the plaintiffs' claims against the S and the state defendants (Pet. App. 33-65). With ect to the intervenors' claims, the court ruled that the L superseded the MBTA as applied to the State of ska, that the AGL incorporated all of the MBTA's ns except in subsistence situations, and, accordingly, subsistence hunting by Alaska Natives is permitted at 9-10, 37-53); it reasoned that the two exceptions to Secretary's regulatory authority in Section 10 of the L—one proscribing restrictions on emergency sub- nce hunting, the other proscribing regulations that

TA—"cannot be reconciled" (Pet.
he inconsistency is best resolved by
the AGL, which provided that ex-
he protection of migratory birds in
in force for 90 days following the
ons pursuant to the AGL, as an ex-
l of the MBTA insofar as it applies
(Pet. App. 45-47). With respect to
laintiff-Fund and plaintiff-Council
ting agreements that the FWS and
had negotiated with the Alaskan
d that, because the AGL repealed
d to the State of Alaska, those
y voluntary concessions on the part
and that the FWS has no authority
53-54); accordingly, it held that the
ding their APA and NEPA claims,
7).

e Fund, the Ninth Circuit reversed
App. 1-32). After rejecting several
made by the FWS (*id.* at 6), the
the MBTA governs the hunting of
hat "the MBTA currently does not
subsistence hunting of migratory
Natives" (*ibid.*). It thus remanded
strict court could determine in the
the Hooper Bay Agreement and its
violate the statutes protecting

uestion, the court began by noting
by the FWIA, the statutes protect-
pressly "allow[] the Secretary of the
ations permitting subsistence hunt-
if the regulations are in accordance
f the treaties that the United States

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App. 22).
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Canada, the Soviet Union, Japan,
19). It then determined that "[t]he
Convention is the most restrictive
and [that] all of the Secretary's
accord with that treaty" (*id.* at 22).
at, under the Canadian Treaty and
migratory birds, "the Secretary may
permit subsistence hunting for up
months between September 1 and
" (*ibid.*).
ed that closed season hunting by
ot permissible under the statutory
atory birds, the court turned to the
ion "that closed season subsistence
Natives is not regulated by the
the 1925 Alaska Game Law" (Pet.
agreed with the district court that
mbiguous as to its relationship with
, noting that Section 10 "explicitly
ry from adopting regulations con-
(*ibid.* (footnote omitted)), but that
AGL * * * could be read as an im-
TA as it applied to Alaska" (*ibid.*).
with the district court's premise that
he Secretary's regulatory authority
e AGL could not be reconciled with
26), finding that "[t]he subsistence
y can be read to permit subsistence
and all birds which are not migra-
]mergency subsistence hunting of
then be permissible insofar as it is
TA" (*ibid.*); and that, while "[t]he
he 1925 AGL does not clarify the
these two clauses," "Congress in-
* policies [relating to] * * * flexi-

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With the district
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Alaskan Natives in
migratory water-
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circumstances to prosecute
statutory prohibitions aga
migratory game birds; the
the authority of the FW
agreements the terms of
statutes. See Pet. App. 13
will have little, if any, effe
these 200 villages or on the
refer, and nothing in the de
ability to accommodate the
the preservationist policies

2. Petitioners also err i
the decision below conflict
Chevron U.S.A. Inc. v. *Na*
cil, Inc., 467 U.S. 837 (1984
plained that, "when a court
tion of the statute which it
give effect to the unambigu
gress" (467 U.S. at 842-843
"the statute is silent or a
specific issue, the question
agency's answer is based o
the statute" (*id.* at 843 (f
below faithfully followed
(Pet. App. 23) that the AGL
ambiguous: The text and leg
ambiguous with respect to
that statute to preclude the
regulations that would proh
food from taking any migr
text and legislative history
whether Congress intended
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congressional intent, the co

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into cooperative
dly violate those
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laskan Natives in
which petitioners
affects the FWS's
laskan Natives or
igratory birds.
(Pet. 18-20) that
Court's decision in
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on in *Chevron* ex-
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Petitioners' claim that the court of appeal
decided the question presented without resolv
issue is therefore without merit—and is not i
claim that would suggest that the court of a
ment warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari shoul

Respectfully submitted.

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